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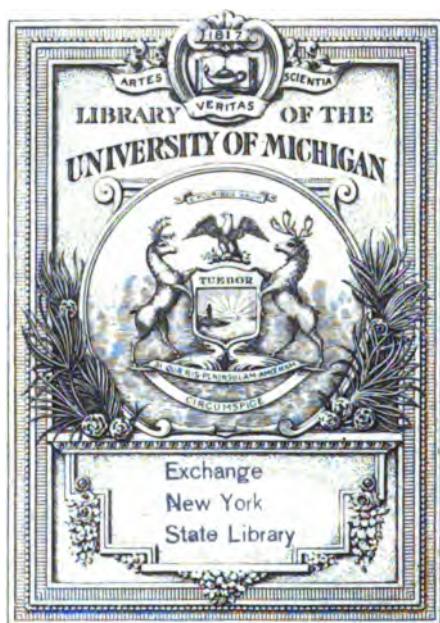
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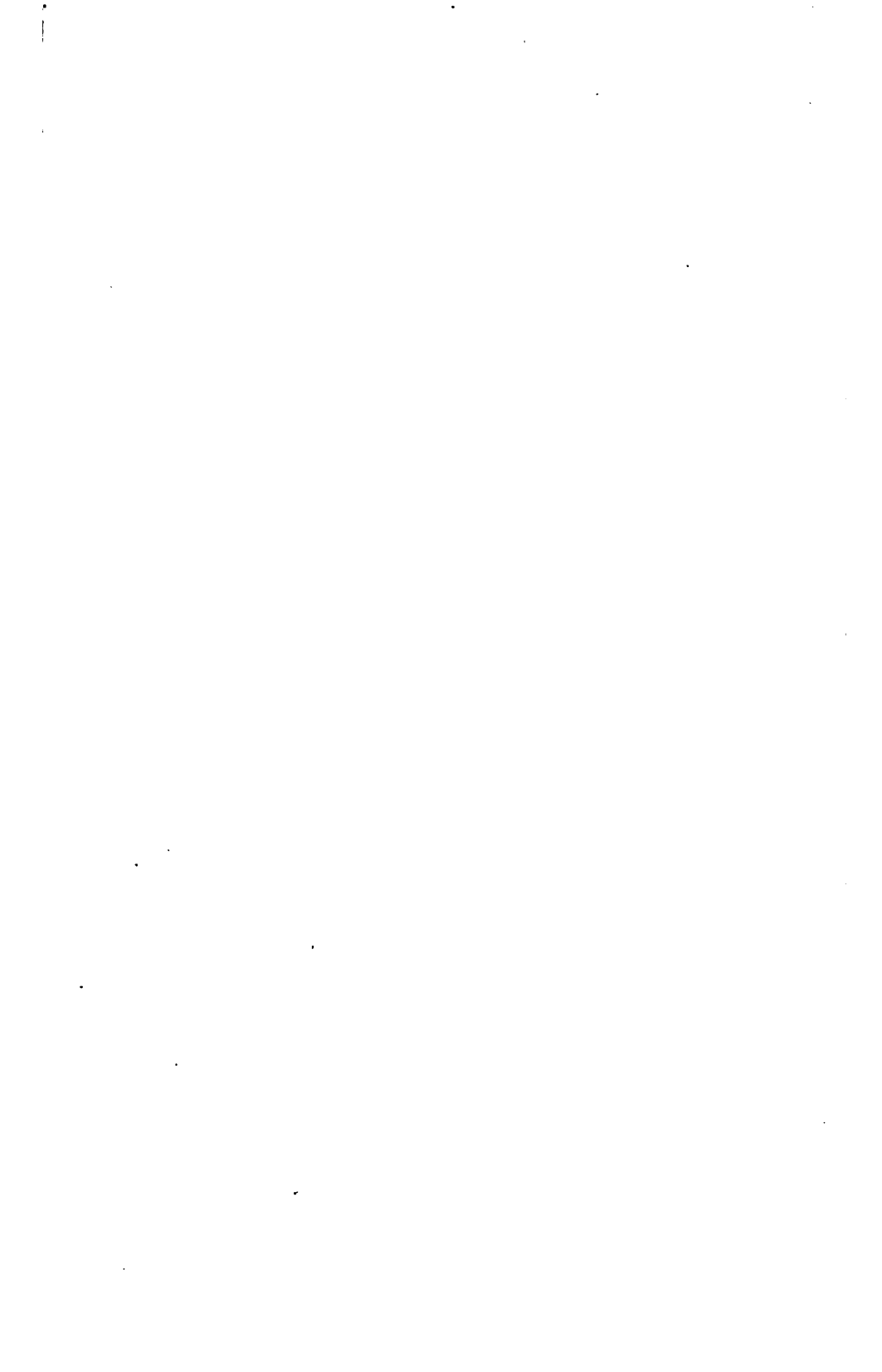
ONE HUNDRED AND FORTY-FOURTH SESSION

1921

VOL. XV — No. 48 — PART 3



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REPORTS OF DECISIONS

OF THE

PUBLIC SERVICE COMMISSION

SECOND DISTRICT

OF THE STATE OF NEW YORK

FROM JANUARY 1, 1920, TO DECEMBER 31, 1920

Volume IX

ALBANY
1921

ALBANY
J. B. LYON COMPANY, PRINTERS
1921

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¹ Appointed April 1, 1920, vice Fennell, term expired.

The Public Service Commission, Second District of the State of New York, was appointed pursuant to the provisions of chapter 429 of the laws of that State for the year 1907, and took office July 1, 1907. It is the practice of the Commission to file written opinions in such contested matters coming before it as seem to demand careful statement of the grounds for the decision. It is also the practice in *ex parte* applications to file written opinions, where the facts are complicated or an interpretation of the laws conferring jurisdiction upon the Commission is required. These opinions are first printed and published in pamphlet form, and later printed and bound in permanent covers. Beginning with the year 1916, Volume V, the opinions rendered in each calendar year have been published and bound under one cover.

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No. 463 : 13

In the Matter of the Petition or Complaint of OWEGO GAS LIGHT COMPANY under sections 71 and 72, Public Service Commissions Law, for authority to increase gas rate.
[Case No. 6937.]

Decided January 6, 1920.

Appearances:

C. E. Stickles, 59 Spencer street, Owego; *F. W. Clifford*, Paige street, Owego; *F. J. Davis*, Paige street, Owego; *Odell J. Watros*, 82 North avenue, Owego, complainants, in person.

E. H. Palmer, President, and *H. O. Palmer*, Vice-president, respectively, of Owego Gas Light Company, Geneva.

FENNELL, Commissioner:

The above company asks permission to increase its rate for gas from \$1.25 per M cubic feet to \$1.50 per M cubic feet. The Commission allowed an increase from \$1 per M cubic feet to \$1.25 per M cubic feet April 17, 1919 [case No. 6445]. The company had previously filed a schedule containing a service charge of 50 cents a month.

In answer to the request for an increase a complaint against service was made. Hearings were held at Albany and Owego. The company urges that it is entitled to the advance in rate, not because such advance would constitute a "fair return" on value, but to make up an operating deficit.

The fixed capital account for 1918 shows.....	\$127,644.82
The bonded debt is.....	50,000.00
For first six months, 1919, revenues were.....	7,307.73
Expenses were	9,580.51
Deficit	2,272.78
Interest bond	\$1,250.00
other	797.72
	<hr/>
Net loss for six months.....	2,047.72
Net loss for year.....	4,320.50
	<hr/>
	8,641.00

Certain changes are being made at the plant which it is expected will permit a saving of about \$3000 a year. The

increase of 25 cents per M cubic feet is expected to produce an increase in revenue of about \$2500 a year. This \$5500 will change an operating loss to an operating profit of about \$1000. Against this there will be interest on bonds and unfunded debts. The company has made a case showing the necessity for the increase of 25 cents per M cubic feet.

The question of service was gone into very thoroughly as the same question had been seriously contested in the former case. The service at that time was poor. The company has apparently made diligent efforts to give satisfactory service, and was succeeding until recently. It is claimed that the recent let down in service is necessarily incident to the making of the changes at the plant. Extensive tests were made in Owego by employees of the Commission under the direction of the gas engineer. Recording pressure gauges were set up at various points over the system to get a good pressure survey. Numerous U-gauge readings were taken. An inspection of the plant was also made. A detailed report of same is on file with the Commission. The gas engineer was sworn at the hearing in Owego and explained what was done and what results were obtained. From all of which it appears that while the plant is small, somewhat old fashioned, and in need of changes, some of which are now being made, the main service difficulty complained about is not due to those causes. The pressure charts of the tests and the company's pressure charts for extended periods show that the pressure in the mains is reasonably satisfactory. The calorific value of the gas was in excess of the required standard from the beginning of the year except on two occasions which were satisfactorily explained to the Commission. The service trouble seems to be located somewhere between the mains and the burners. Some of the trouble is probably due to small service lines extending from the mains to the houses. These service lines are many of them very old and may have gotten out of proper level so that instead of having a drainage there may be slight pocket effects here and there.

No. 463 : 13

There is also some question about the small size of the taps when the old service lines were connected to the mains. Although certain service complaints seem to be due at least in part to service line conditions between the mains and the cellar walls, no completely satisfactory explanation was given as to the exact cause. It appears that most of the service trouble is due not to insufficiency of mains but to conditions in service lines and house lines, such as small, old, or rusty pipes, accumulations in the pipes, improper adjustment of burners, etc. It would seem that these conditions can only be remedied by careful attention to each service complaint by the local manager in charge, and an attempt on his part to remedy the defect in each instance as it comes up. This is being done, and it is expected that when the changes at the plant are completed the service will be brought to a reasonably satisfactory condition.

The company endeavoring, as it is, to manufacture and deliver good gas and to render satisfactory service, and in view of the operating deficit, it seems only fair that the increase of 25 cents per M cubic feet be allowed.

An order has been made accordingly.

All concur.

Petition of ORANGE COUNTY TRACTION COMPANY under section 184, Railroad Law, for approval of a declaration of abandonment of a portion of its constructed route in the city of Newburgh. [Case No. 6921.]

Petition for approval of a "Declaration of Abandonment" of a line of street railway denied where such declaration included the entire line and it appeared that only a portion of the line should be abandoned, the Commission being without power to vary the terms of the declaration.

Decided January 6, 1920.

Appearances:

Ainsworth, Carlisle, Sullivan & Archibald (by Mr. Carlisle), 93 State street, Albany; *B. Bryant Odell*, secretary, and *William F. Cassedy*, counsel, for petitioner.

Jonathan B. Wilson, Mayor, and *John B. Corwin*, Corporation Counsel, for the City of Newburgh.

Graham Witschief, Newburgh, for various objectors.

FENNELL, Commissioner:

This is an application by the Orange County Traction Company for approval of a declaration of abandonment of a branch of its line within the city of Newburgh known as the Bridge Street line. This line begins at the intersection of Renwick and Liberty streets, and extends through Renwick street and Bridge street to the terminus of the line near Quassaic bridge, a distance of 2900 feet.

The reason given in the petition for the abandonment is, in effect, that the portion of the company's route sought to be discontinued is no longer necessary for the successful operation of the railroad of the petitioner and the convenience of the public. The main reason developed by the testimony is the claim of the railroad company that the Bridge Street line is not financially successful.

No. 464:16

The evidence in the case and the reports of the corporation on file with the Commission show that the system as a whole has not produced a fair return upon investment, and that the line in question has never since its construction been a paying one.

The Bridge Street line extends from its junction with the Liberty Street line at the corner of Renwick and Liberty streets in a westerly direction along Renwick street, a distance of 1425 feet to the corner of Renwick, William, and Bridge streets, thence along Bridge street in a southwesterly direction 1475 feet to Quassaic bridge. The evidence in the case, a personal inspection of the locality by the sitting Commissioner, and a subsequent inspection and study of the same locality by the chief of the division of street railroads of the Public Service Commission, Second District, show that the line on Renwick street from Liberty street to William street, a distance of four blocks, serves a public convenience as the territory on both sides of the track along those blocks is reasonably well built up, and while the line does not pay its own way it would seem as though the rest of the system might reasonably carry this portion of the line for the public convenience. However, that portion of the line extending from the corner of Renwick, William, and Bridge streets along Bridge street to Quassaic bridge runs through a sparsely settled section, and the use of the line over a period of years indicates that it does not serve the public convenience to a very large extent.

It has been suggested that the territory lying in the right angle between Renwick street which runs westerly from Liberty, and Liberty street which runs southerly from Renwick, would be better served by a loop connecting the dead end at the end of Liberty Street line and what would be a dead end on the Renwick Street line if the Bridge Street end of that line were abandoned. Such a loop would probably require the abandonment of the Renwick Street line beyond Monument street, and the construction of a new line

southerly on Monument street four blocks to Henry street, thence easterly on Henry street to Liberty street. There would be sufficient track in the abandoned line to build the loop. Such a loop would probably serve a greater public convenience than either the present layout or the two dead ends if part of the Bridge Street line is abandoned.

While it would seem proper to permit the abandonment of the Bridge Street line from the corner of Renwick, William, and Bridge streets to the Quassaic bridge, and refuse permission to abandon the line from the corner of Renwick, William, and Bridge streets to the corner of Renwick and Liberty streets, there may be some question as to the power of the Commission to make such an order. As there is before the Commission in the instant case a "declaration of abandonment" of the whole line and as "such declaration" has been submitted to this Commission for its approval and as the Commission should not approve the declaration as it stands and has no power to modify the declaration, the Commission can not give its approval to the declaration of abandonment of the whole line as submitted to it, and an order has been drawn accordingly.

If the petitioning company desires to submit a declaration of abandonment of the Bridge Street line between the corner of Renwick, William, and Bridge streets and the Quassaic bridge the Commission can give speedy action thereon as the evidence in this case will be available.

All concur.

No. 465 : 19

Petition of UNITED STATES RAILROAD ADMINISTRATION, NEW YORK CENTRAL RAILROAD, and WEST SHORE RAILROAD under section 91, Railroad Law, for an order determining that the crossings at grade of Sodus street and the New York Central railroad, and of Waterloo street and the West Shore railroad, lessor, in the incorporated village of Clyde, Wayne county, shall be closed and discontinued, and travel thereon diverted. [Case No. 7151.]

Decided January 8, 1920.

Appearances:

Daniel M. Beach, Esq., for petitioner.

Alfred S. Armstrong, Esq., for respondents, citizens of Clyde.

BARHITE, Commissioner:

This is an application by the United States Railroad Administration and The New York Central Railroad Company asking for an order closing and discontinuing the street known as Sodus street just north of the main line right of way and at the point where the tracks of The New York Central Railroad Company cross said street at grade in the village of Clyde, New York; and also closing and discontinuing Waterloo street just south of the point where the tracks of the West Shore Railroad Company cross said street at grade.

Clyde, according to the state enumeration of 1915, is a village of 2699 inhabitants. The Clyde river passes through the village from east to west. The larger part, and nearly all of the business section, of the village is upon the northerly side of the river. Previous to the construction of the Barge canal the river was crossed by two bridges, one connecting Glasgow street on the north with Mill street on the south, and one connecting Sodus street on the north with Waterloo street on the south. These two bridges were about five

hundred feet apart. It may be said that Glasgow street is the principal business street of the village.

Along the northerly bank of the river pass the four main tracks of the New York Central railroad with two or three switch tracks in addition, and along the southerly bank pass the two main tracks of the West Shore railroad with additional switch tracks. The streets named above on both sides of the river were crossed at grade. On both sides of the river the rights of way of the railroads extended to the river bank.

When the State determined to use the Clyde river as a part of the Barge Canal system, a map of the Clyde river and the surrounding territory in the village was made. This plan was approved by the railroad, by the canal authorities, and by the president of the village under authority derived from the village board. The plan clearly showed that the street across the river between Sodus street on the north and Waterloo street on the south was to be closed from a point just north of the tracks of the New York Central railroad to a point on the south shore of the river. It further showed that the passenger station of the New York Central railroad was to be placed between the main tracks of the road and the canal bank extending for some considerable distance within the limits of Sodus street. The freight house of the same railroad is east of Glasgow street and access to it is not in question. According to the plan, for passage over the river between Glasgow street and Mill street, a steel viaduct with its approaches 1210 feet in length was built, extending over the tracks of the New York Central, the Barge canal, and the tracks of the West Shore railroad. This viaduct has a driveway twenty-two feet in width and a sidewalk on the easterly side seven feet in width. The approach to the viaduct on Glasgow street is a 6 per cent grade; in Mill street it is about a 1 per cent grade. On both sides of the canal are stairways which lead from the viaduct to the surface of the ground. On the north side the stairways

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lead to the cement platform which leads along the tracks to the passenger station. In addition, on the north side of the canal is a passageway nineteen or twenty feet wide, leading from the viaduct to the passenger station by a 6 per cent grade, intended for the use of trains and automobiles. This viaduct was built by the railroad and the State jointly, and cost approximately \$200,000. The respondents are not satisfied with the viaduct and claim that its approaches are dangerous and difficult. They object to the grade crossings at Sodus street and Waterloo street being closed, upon the ground that they desire that the bridge which passed over the canal at that point and which has been removed by the canal authorities be restored.

The Public Service Commission has no power to restore the bridge in question. The Canal Law, section 121, provides: "The Superintendent of Public Works is authorized and required to construct and hereafter maintain at public expense road and street bridges over the canals in all places where such bridges were constructed prior to the 20th day of April, 1839, if in his opinion the public convenience requires that they should be continued." It appears by the evidence that the first bridge at the point named was built in the year 1810. Section 125 of the Canal Law further provides that no bridge shall be constructed across any canal without first obtaining for the model and the location the written consent of the Superintendent of Public Works or of a superintendent of repairs upon that line of the canal which is intersected by the road or highway of which the bridge is to be a part.

The only question before the Commission is whether the grade crossings at Sodus and Waterloo streets under present conditions should be closed and discontinued as a menace to public safety. Over the tracks of the New York Central railroad and the Sodus street crossing fifty-three regular passenger trains pass in a day of twenty-four hours. Seven of these stop at the Clyde station, and the remainder pass

over the crossing at full speed. Then, in addition, there are about an equal number of freight and switching movements over the crossing. Over the Waterloo Street crossing on the West Shore railroad there are about forty through freight movements per day besides other train movements of a miscellaneous character. At the present time the Waterloo Street grade crossing is fenced off and not used by the public. The planking has been removed and no crossing remains.

It is unnecessary for the Commission in this proceeding to determine what its conclusions may be if the canal authorities desire to replace the bridge across the canal.

Both Sodus street and Waterloo street lead to the bank of the canal and there end. It is true that the passenger station of the New York Central railroad may be reached through Sodus street, but access to the same station both for foot passengers and vehicles may be had by the way of the viaduct.

The prayer of the petition should be granted with leave to reopen if changed conditions warrant such action.

All concur.

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In the Matter of the Complaint of SAND LAKE BOARD OF TRADE, Rensselaer county, *against* WYNANTSKILL HYDRO-ELECTRIC COMPANY as to proposed increase in rates.
[Case No. 6450.]

In the Matter of the Complaint under sections 71 and 72, Public Service Commissions Law, of CUSTOMERS LIVING IN THE TOWN OF NORTH GREENBUSH, Rensselaer county, *against* WYNANTSKILL HYDRO-ELECTRIC COMPANY as to increase in rates for electricity, and as to service.
[Case No. 6477.]

Decided January 13, 1920.

Appearances:

Frederick E. Draper, 16 First street, Troy, for the Sand Lake Board of Trade, complainant.

Guy F. Swinnerton, Cannon Place, Troy, for complainants in case No. 6477.

Clifford C. Hastings, President, and *Douglas H. Hastings*, Treasurer, for the Wynantskill Hydro-Electric Company, respondent.

H. P. Humphrey, National State Bank Building, Troy, and *Owen Conley*, Troy, for the respondent.

FENNELL, Commissioner:

Case No. 6450 is a complaint by the Sand Lake Board of Trade, Rensselaer county, against the Wynantskill Hydro-Electric Company. Case No. 6477 is a complaint by customers living in the town of North Greenbush, Rensselaer county, against the same company. These complaints were against the same schedule of rates and were heard as one case.

The old rates were 10 cents per kw.h. for light and power. The new rates are 14 cents per kw.h. for light and 14 cents per kw.h. for power for the first 100 kw.h., with lower rates for quantities in excess of 100 kw.h.

The company uses water power, with steam auxiliary at its plant which is located on Wynantskill creek near the village of West Sand Lake, N. Y. The land and appurtenant water rights are owned by the estate of Milo Hastings, and are leased to the company. The company has been operating for about seven years in the town of Sand Lake and the eastern portion of the town of North Greenbush, Rensselaer county. The operation has been conducted by the Hastings brothers as a sort of "family affair". The total population of the territory in which the company operates is approximately 2800. There are a number of summer residences and some small hotels in this territory so that the summer population is larger than the winter population. In the village of Averill Park there is also an amusement park which uses considerable electric current in the summer season. The company's lines are about twenty miles in extent, are rather lightly built, and serve 325 customers, about sixteen per mile.

While these two cases were on trial another case was started involving this company and its operations. The Swansdown Knitting Company had a mill in the franchise territory of the Wynantskill company. Considerable electric energy was needed for this mill and the knitting company built a transmission line through the franchise territory of the Wynantskill company into the franchise territory of the Albany Southern Railroad Company to reach the transmission line of the latter company. The Wynantskill company brought a proceeding before this Commission opposing the carrying out of the proposed power scheme of the Swansdown Knitting Company [case No. 6573]. Many hearings and conferences were held and adjournments taken from time to time to permit negotiations which finally ended in a settlement. This settlement provided, among other things, that the Albany Southern Railroad Company would furnish power through the trans-

mission line built by the Swansdown Knitting Company to the Wynantskill plant, which plant is located near the Swansdown Knitting Mills, and would furnish electric energy as needed by the Wynantskill company at an agreed price.

The company now has three sources of power: the Albany Southern Railroad Company, its own hydro-electric plant, and its own steam plant. The Albany Southern transmission line carries 12000 volts. This has to be stepped down to 2300 volts, the voltage used on the distribution system of the Wynantskill company.

Hearings in these two cases were suspended pending the disposition of case No. 6573. Hearings were thereafter resumed and were concluded November 5, 1919. It appeared from the evidence given at the earlier hearings that because of the rather light line construction, the large area covered by the lines, the small load factor, twenty-four hour service, transformer losses, etc., the company actually delivered and received pay for 45 per cent of the electric energy generated.

On July 1, 1919, the Wynantskill company commenced to purchase power from the Albany Southern. From that time until the last hearing in this case, November 5, 1919, the company generated about 60 per cent and purchased about 40 per cent of its electric energy. In the meantime the company has also taken on a contract to furnish twenty-four hour service to the County Tuberculosis Hospital, which hospital has a capacity of two hundred patients.

It was urged on the part of the complainants that the line losses were too great and that it was unnecessary to have both the Hastings brothers employed by the company. These brothers claim that they are giving their full time to the company's business, and while some saving would be made by substituting cheaper help in place of one of them, the saving, at the present rate of wages, would not be sufficient materially to affect the operating expenses. There is

also some question as to whether so extensive a line loss ought not to be borne at least in part by the owners of the plant. If the estimates made by the company are reasonably accurate, the owners will bear a share of such loss. Adjustments made to meet such wage reduction and line loss would not produce, having in mind a fair return, a reduction of rates below 14 cents per kw.h.

The Commission's division of light, heat and power found the fixed capital as of October 1, 1918, amounted to \$18,203.74; the additions since amount to \$1144.67: total, \$19,348.41. The company has outstanding \$7500 of 6 per cent bonds.

The company estimates that for the year beginning October 1, 1919, its expenses, including taxes, will be \$8036.45, and that its revenues for the same period will be \$8580.

Reducing items of estimated expense that appear a bit high, including a cut in the salary of one of the Hastings from \$1800 to \$1200 per annum, there remains a total annual expense of \$7121 in place of \$8036.45. The estimate of expected annual revenues of \$8580 may as well be accepted for the present as the contract with the Tuberculosis Hospital and the power sales possibilities because of the Albany Southern contract are now uncertain factors. Only experience under the new conditions will give a fair measure of the revenues.

With expected revenues of \$8580 less estimated expenses, so adjusted, of \$7121, there remains a balance as profit of \$1459. As an 8 per cent return on \$19,348.41 would be \$1547.84 it seems that the present rate of 14 cents per kw.h. should be permitted to stand as a maximum. However, as the revenues may be more than expected, the maximum rate herein permitted should stand until October 1, 1920, and until the further order of the Commission.

Within thirty days after October 1, 1920, these cases

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should be reopened to check the estimated revenues and expenses with actual revenues and expenses for the year ending October 1, 1920, and to make such further order as shall then be found necessary.

An order has been made accordingly.

All concur.

Petition of EDSON U. GAISER under chapter 667, laws of 1915, and chapter 307, laws of 1919, for a certificate of public convenience and necessity for the operation of a stage route by auto buses in the incorporated village of Lewiston, Niagara county. [Case No. 7092.]

It is the policy of the Commission to protect existing public utility corporations from competition where they are giving adequate service.

Decided January 15, 1920.

Appearances:

Glenn A. Stockwell and *Alfred W. Gray*, Niagara Falls, attorneys for petitioner.

George C. Riley, Buffalo, attorney for The Niagara Gorge Railroad Company.

Cohn, Chormann & Franchot, by *Morris Cohn, jr.*, Niagara Falls, for International Railway Company.

C. F. Conroy, Business Agent of the Street Car Men's Union, Buffalo.

Maurice C. Spratt, Buffalo, attorney for The New York Central Railroad Company.

HILL, Chairman:

The petitioner prays for the approval by the Commission, pursuant to the provisions of sections 25 and 26 of the Transportation Corporations Law, of a consent which has been granted by the trustees of the Village of Lewiston to the operation of petitioner's bus line on certain streets in that village, including a short stretch on Center street extending from Fourth street to Niagara river. This particular portion of the route is thus specially referred to because it is the only portion to which opposition is made by certain of the objectors.

The applicant has for some time operated a bus line in the city of Niagara Falls under a consent of the local authorities of that municipality, his route extending from that city northerly along the highway which parallels Niagara

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river to the Niagara Falls Country Club, at what is known as Lewiston Heights, and thence into the village of Lewiston. Shortly after he began running into Lewiston, the Legislature amended section 28 of the Transportation Corporations Law effective May 3, 1919, making it necessary for petitioner to secure the consent of the local authorities provided the latter decided to come within the effect of the statute by adopting a resolution to that effect. On the 4th of June, 1919, the trustees of the Village of Lewiston took such action. Previous thereto, however, on May 16th, petitioner had begun operation on the streets of Lewiston, including the section of Center street lying between Fourth street and the river, to which special reference has already been made.

On the 24th of July, thereafter, the trustees of the village granted to the applicant a consent, pursuant to the statute above mentioned, permitting him to operate his bus line upon certain streets designated, including what we may call the river end of Center street above referred to. This resolution provided for the payment of a license fee of \$955, which the applicant paid, and he now requests the approval of the Commission to the said consent and its operation thereunder, as required by the statute in question.

Opposition is made by The Niagara Gorge Railroad Company and the International Railway Company, both being electric railroads, and The New York Central Railroad Company, a steam railroad. Both The Niagara Gorge Railroad Company and The New York Central Railroad Company operate railroads from the city of Niagara Falls to the railroad docks on the river front at the foot of Center street in the village of Lewiston, and have so operated for many years. This has for a long time been a very important passenger transfer point in connection with summer pleasure travel, the railroads in question connecting there with large and commodious steamers operating daily from that point to Toronto. The reason for the objections

is that if Gaiser is allowed to run his buses from the city of Niagara Falls to this dock in competition with the New York Central and Gorge routes, he will divert from those routes a part of their through traffic between Niagara Falls and Lewiston. The opposition of the International Railway Company is based upon the interest which that company has, by contract, in the passenger traffic of the Gorge route.

The Niagara Gorge railroad gives a very frequent service between Niagara Falls and Lewiston the year around, whereas the New York Central service is comparatively infrequent, its business being principally the accommodation of the steamboat traffic in the Summer.

It has long been the policy of the Commission to discourage and prevent undue competition in all classes of public service, and the propriety of the furtherance of this policy receives peculiar emphasis from the present depressed financial condition of nearly all railroads, whether steam or electric, by reason of the recent great advances in the cost of operation of such properties. If, therefore, the present service on the Gorge railroad and New York Central railroad can be said adequately to supply the needs of the public so far as concerns through travel between Niagara Falls and the Lewiston docks, then we think petitioner should not be allowed to enter into competition with those companies in that business. From all of the evidence, I am satisfied that the service of the Gorge route and of the New York Central is adequate, and that public convenience and necessity does not demand any additional facilities between those points. The relief from competition in this respect can be afforded by requiring the applicant to stipulate not to practice such competition.

The opposition of the New York Central is based, however, on a still further ground, namely that its Rome, Watertown and Ogdensburg branch operates between the city of Niagara Falls and a station in or near the outskirts of the

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village of Lewiston, and that the passenger traffic on that line would be interfered with. It appears, however, that only two trains a day operate on this line, that the Lewiston station does not conveniently accommodate passengers for Lewiston, and it therefore seems proper that this objection should be disregarded.

We think the petitioner has shown sufficient evidence of public convenience and necessity to sustain his application. There is considerable travel between the northerly end of the city of Niagara Falls and Lewiston, and also between Niagara Falls generally and the Niagara Falls Country Club situated on petitioner's route between Niagara Falls and Lewiston. While the line of petitioner's route is very close to the Gorge route and the New York Central boat line, these latter lines, by reason of the peculiar topography of the river bank, are so far below the grade of the highway as to afford no facilities to passengers desiring to alight or embark between Walnut street in the city of Niagara Falls and the village of Lewiston. This business can be accommodated by applicant's buses, and we think the demand for such facilities, which are not now furnished by anyone, is sufficient to warrant this enterprise. On the other hand, the evidence shows so little demand for service between the boat landing and points on applicant's bus route south of Walnut street in Niagara Falls as to make it evident that the principal traffic to and from the boat landing would be through traffic to Niagara Falls in competition with the other lines mentioned.

A disposition of the application in conformity with the views above expressed calls for a dismissal thereof, unless the applicant will file a stipulation not to carry passengers between the boat landing at Lewiston and points south of Walnut street in the city of Niagara Falls, the terms of the stipulation and of the order to be settled by the Chairman.

Fennell and Kellogg, Commissioners, concur; Irvine, Commissioner, not voting; Barhite, Commissioner, absent.

Petition of JOHN A. DuBois under the Transportation Corporations Law for a certificate of public convenience and necessity for the operation of a stage route by auto buses in the city of Newburgh, it being also proposed that the route shall be operated from the incorporated village of Marlboro to and through Newburgh to the shipyards at New Windsor. [Case No. 6929.]

Decided January 20, 1920.

Appearances:

Graham Witschief, 44 Smith street, Newburgh, for the petitioner.

Alexander Johnson, Savings Bank Building, Newburgh, for Edward K. Lyons, in opposition.

William F. Cassidy, Newburgh, for Orange County Traction Company.

FENNELL, Commissioner:

Petitioner asks for a certificate of public convenience and necessity as indicated in the above title. The municipal authorities of the City of Newburgh gave consent to the petitioner to operate auto buses on certain streets in that city upon stated terms and restrictions. The granting of the certificate of convenience and necessity was opposed by Edward K. Lyons, who operates an auto bus line from Marlboro to Newburgh.

Marlboro is about eight miles north of Newburgh. The new shipyard at New Windsor is south of the city of Newburgh and about a mile beyond the nearest trolley point in that city. About forty men lived at Marlboro or points between there and Newburgh who worked at the shipyard in New Windsor. The petitioner who resides in Marlboro started in the auto bus business by having an auto bus leave Marlboro at 6:50 a. m. and take the shipyard workers to the New Windsor shipyard. The auto bus was left at the

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shipyard during the day and the men brought back home in it at night. The chauffeur worked in the shipyard during the day. This was done when ships were being built for the United States Government, and the auto bus service was a great convenience to the men working in the shipyard. Some time later, about June 23, 1919, DuBois, the petitioner, having hired a chauffeur who was not working at the shipyard, started auto bus operations on a regular schedule. DuBois conducts a garage and repair shop at Marlboro and his auto buses when not in use are kept there. Lyons resides in Newburgh and his auto buses when not in use are kept there. It will readily be seen that DuBois can more conveniently and economically make the 6:50 a. m. trip from Marlboro to the shipyard and the 11 p. m. trip from Newburgh to Marlboro. Lyons has not rendered auto bus service from Marlboro to the shipyard, but only from Marlboro to Newburgh, although he is willing if this petition is denied to render service to the shipyard.

When necessity required the carrying of the shipyard workers from Marlboro to New Windsor, Lyons did not furnish that service although he was on the ground and had auto buses operating between Marlboro and Newburgh. DuBois having met that necessity should be permitted to keep that business. As to the other business between Marlboro and Newburgh, a report of Mr. Lyons' receipts from fares do not show any falling off during the period following June 23rd for which figures were given.

The petition of DuBois should be granted. An order has been made accordingly.

Chairman Hill and Commissioners Irvine and Kellogg concur; Commissioner Barbite not present.

Petition or Complaint of UNITED TRACTION COMPANY under subdivision 1, section 49, Public Service Commissions Law, and section 181, Railroad Law, as to increasing passenger fares. [Case No. 6979.]

1. A municipality may not, in granting consent to the construction of a street railroad, impose a condition limiting rates of fare to be charged to and from points outside the municipality.

2. On an application for further increase in rates by the United Traction Company, after an examination of its affairs along lines similar to those pursued in the *Petition of United Traction Company*, 7 Public Service Commission Reports 207, it was found that because of increased operating expenses chiefly arising from higher labor costs no practicable rate of fare less than seven cents in each of the zones specified in the case above cited would suffice to permit the corporation to pay operating expenses, taxes, and interest on its bonds, the value of its property used in the public service being at least equal to the amount of those bonds.

Decided January 22, 1920.

Appearances:

John E. MacLean, Albany, and *H. T. Newcomb*, 50 Nassau street, New York city, attorneys for United Traction Company.

Arthur L. Andrews, Corporation Counsel, and *J. J. McManus*, Assistant Corporation Counsel, for the City of Albany.

William E. Fitzsimmons, Albany, attorney for Albany Chamber of Commerce.

Chester Wood, Corporation Counsel, for the City of Watervliet.

Arthur B. Lamphier, Corporation Counsel, for the City of Rensselaer.

J. E. Wilbur, Watervliet Arsenal, Watervliet, representing R. J. Lennon, Chief of the Public Service Division of Watervliet Arsenal.

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IRVINE, Commissioner:

August 13, 1918, the United Traction Company was authorized to file tariffs increasing its rates of fare in such manner as to permit a rate of six cents in the Troy zone, six cents in the Albany zone, and a resultant rate of twelve cents between the two zones, with transfer privileges in each. The company now applies to be permitted to make a further increase to seven cents in each of the zones, with a resultant fare of fourteen cents on the through lines, with similar transfer privileges. The fundamental questions relating to rates on this system were discussed and decided in the 1918 case, 7 Public Service Commission Reports, Second District, 207. These need not be again considered. In this case no attempt has been made except by cross-examination to attack the evidence and figures presented on behalf of the petitioner. The case of the petitioner is based upon the claim of the necessity of increased revenues in order to offset increased operating expenses, especially in its payrolls. Before considering this feature it becomes necessary to consider certain arguments presented on behalf of the City of Watervliet, based on a ground to some extent independent of what may be considered the essential merits of a rate case.

The City of Troy, the City of Watervliet, and the Village of Green Island claim the existence of franchise conditions which under the decision of the Court of Appeals *In the Matter of Quinby*, 223 N. Y. 244, would, unless waived, prevent the Commission from authorizing any rates beyond those therein fixed. The City of Troy, by ordinance dated July 17, 1919, waived the limits in its franchise so far as to authorize, in the event that this Commission should determine that such increase should be granted, a fare not in excess of seven cents within the city of Troy, and purporting to make a like restriction to seven cents between points within the city of Troy and points outside thereof where the six cents fare is now collected. The Village of Green

Island claimed a restriction of five cents from points within the village of Green Island to points within the city of Cohoes, and from points within the village of Green Island to points within the city of Troy, and to points in and between the village of Green Island and the city of Watervliet, the city of Cohoes, the village of Waterford, and the city of Troy. It has passed a further ordinance waiving these rights to the extent of permitting a fare of seven cents within such limits. The City of Watervliet claims a franchise limitation of five cents between points in the city of Watervliet and points within the city of Troy.

No question arises in direct connection with the Troy waiver, and there was no appearance at the hearings on behalf of the City of Troy. Nothing in the order which will be made would run counter to the direct terms of the Green Island waiver. It is, however, strongly insisted that no increase can be made beyond the present rates affecting the city of Watervliet. The only franchise restriction called to the attention of the Commission by the City of Watervliet is in a franchise granted to the Schenectady Railway in 1902. This, so far as pertinent to the present case, is as follows: "Said company shall carry passengers and not charge nor receive a fare exceeding five cents for passage on its cars from any point in the city of Watervliet to any point within the city of Troy, or from any point in the city of Troy to any point within the city of Watervliet." The franchise is for the construction of tracks by the Schenectady Railway Company along certain streets in the city of Watervliet from the boundary line between the city and the town of Colonie to a point at Third avenue and Twenty-fifth street in the city of Watervliet where connection was made with the lines of the United Traction Company. The Schenectady company first operated its cars over this track and over lines of the United Traction Company into the city of Troy, but subsequently the United

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Traction Company, by contract with the Schenectady company, took over the operation of the Schenectady cars within the limits of the cities of Watervliet and Troy, and the franchise was transferred to the United Traction Company. It will be seen that there is no restriction on rates to and from points wholly within the city of Watervliet. The plain object of the restriction was to secure a single fare between the city of Watervliet and the city of Troy. The nature of this franchise was discussed *In the Matter of Schenectady Railway Company*, case No. 6853, decided May 20, 1919. The question here presented was then decided adversely to the contention of the City of Watervliet. A similar question has recently been decided in the same manner, *Complaint of Wilkins v. New York State Railways*, decided November 25, 1919. The question was also similarly determined by the Supreme Court at Special Term *In the Matter of the Application of Koehn v. Public Service Commission*, 107 Miscellaneous 151. Whatever may be the power of a municipality to limit a rate of fare to be charged by a street railway within its boundaries as a condition for granting consent to construct, it is settled for the present at least that it may not undertake to fix rates for travel extending outside of the municipality.

It is, however, argued that the City of Troy and the Village of Green Island attached to their present waivers a condition that they should become effective only when and if all other municipalities should grant similar waivers, and that this action tied up the City of Troy and the Village of Green Island with the City of Watervliet in such a manner as to prevent any waiver from becoming effective unless and until all three municipalities joined in similar waivers. When we examine the Troy ordinance we find that the following provision must be the one relied on: "This ordinance shall be of no force or effect until all of the municipalities where said company now operates and maintains portions of its railroad under franchise or franchises containing

limitations as to the amount of fare that may be collected within the limits of such municipalities shall by appropriate action suspend the operation of such provisions for a period of one year, at least, from the entry of an order of the Public Service Commission of the State of New York as aforesaid, or until such further time as said municipalities deem proper." The Green Island ordinance is of the same tenor. Troy is the only municipality which granted a franchise containing a limitation as to the amount of fare to be collected "within the limits of such municipality". The attempted restrictions in Watervliet and Green Island extending beyond the limits of the municipalities were void and no waivers are required. Therefore the Troy waiver is complete within itself and the Watervliet restrictions must be disregarded.

Approaching then the merits of the application, we find that the operating revenues have not quite met the estimates made in the 1918 Opinion. We also find that the operating expenses have very largely increased beyond the estimates then made. The chief reason for the increase is higher labor costs. A retroactive award was made by the War Labor Board after the evidence was taken in the 1918 case and before the decision. This involved an increase of about \$100,000 per annum. In constructing an income account on the basis of the six cents fare allowed in that case, operating expenses were based on those of 1917, and so appear in the table in 7 Public Service Commission, Second District, Reports, p. 218. July 1, 1919, further increases were made not only to motormen and conductors but to practically all employees except those in the general office. The company estimates the effect of these increases to be \$184,000 a year. This estimate has been checked as carefully as possible with payroll statements of previous years and found to be practically correct. In the table referred to, maintenance of way and structures and maintenance of equipment were computed on the average of

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eight other large urban traction companies. The actual figures for the first nine months of 1919 are much in excess of that calculation, but so are the similar items of other companies. They generally reflect the great increase in labor and materials costs of 1919 over 1917, which in turn reflect the generally inflated prices of the present day. The average for the other roads in maintenance of way and structures is 3.39 cents per car-mile, for the United Traction Company 3.94 cents; for maintenance of equipment the average of the other companies is 3.68 cents, for the United Traction Company 3.22 cents. Comparisons in such matters as these are of considerable weight, and this comparison does not indicate any extravagance on the part of the United Traction Company. The increased cost of conducting transportation (wages of motormen and conductors), together with the increased cost of maintenance of way and of equipment, practically account for the failure of the estimate for 1918 to meet the situation in 1919 or the probable situation in 1920.

In the calculations which have been made the figures for the first nine months of 1919 have been used and projected throughout the year as a basis for the 1920 estimate. It has been found by an examination of the annual reports of the company for a series of years that the revenues and expenses for the last half of the year are surprisingly close to those of the first half, and that those for the third quarter correspond as closely with the fourth. The writer, prior to this examination, was of the opinion, based on examining the affairs of other companies, that the first half of the year would show smaller revenues and higher expenses than the last half. This is not true of the United Traction Company. The difference is so slight that any error caused by estimating the entire year on the basis of nine months' operations could not possibly affect the result. The first nine months of 1919 have been taken rather than the year ended September 30th because the last quarter of 1918 was

abnormal. The six cents fare was then new, and undoubtedly the number of revenue passengers was decreased because of the increased fare more in that quarter than in subsequent quarters. Furthermore, there was a very large decrease in the number of revenue passengers due to the epidemic of influenza. To use the entire year ended September 30th would be misleading for these and perhaps for other reasons, and would point to a worse plight for the company than we find it to be in by calculating the calendar year 1919 on the basis of the first nine months' operations.

The number of passengers in the three quarters taken for comparison as compared with corresponding quarters under the five cents fare decreased 4.26 per cent. What the effect of a further increase of one cent would be it is impossible to conjecture with any degree of certainty. Where rates in other cities have been increased there has been with two exceptions a decrease in the number of revenue passengers. A seven cents fare has been permitted to several other city companies but they operate in smaller communities, and local conditions so greatly affected the problem that no generalization applicable to the United Traction Company is possible. If the larger cities are taken, we find under an increase of from five cents to six cents there has been an actual increase in the number of passengers in Syracuse and a marked decrease in Utica. Local conditions due to the armistice and consequent industrial changes seem chiefly accountable for this difference. In the absence of data permitting a reasonable deduction as to the effect of a further increase, the reduction in number of passengers has been assumed at 5 per cent and also at 10 per cent in the calculations following.

In the following table the actual income account for nine months ended September 30, 1919, appears in the first column. This is projected through the year in the second column, including the advanced labor costs. It shows a net operating revenue of \$206,647. When taxes





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and rents are deducted this becomes a deficit of \$40,624 and leaves a net corporate deficit of \$273,884. It is evident, therefore, that the company is entitled to some relief. The remaining columns are estimates on different bases: first, on the assumption of a seven cents cash fare; and next on the assumption of a seven cents cash fare and certain possible ticket rates. Columns 3 and 4 are based on the company's evidence as to operating expenses. The remaining columns are based on calculations of operating expenses constructed in a manner similar to the plan used in the 1918 Opinion but with varying assumptions as to rates of fare and decrease in number of passengers.

Before undertaking any deductions from the figures presented some further explanation is necessary. As already stated, the second column is a constructive income account for the year 1920 based on the actual operations of the first nine months of 1919, assuming the present fare to continue but adjusting items involving labor to the present rates. The increases made July 1, 1919, appear in the first column only as involved in the operations of the third quarter.

Effective January 1, 1918, there was a revision of the Uniform System of Accounts adopted by the Commission. This creates certain apparent discrepancies between the table above referred to in the 1918 Opinion and the table now presented. For example, power expense was formerly embraced in transportation. Now the item of transportation is subdivided into power expense and conducting transportation. In 1917 there was a charge of \$111,192 for rent. This is largely transferred to general and miscellaneous expense account making a corresponding increase in the latter item.

On every basis assumed and with each assumption as to new rates of fare, it seems that a deficit would unavoidably result except on the assumption of a straight seven cents fare and expenses computed according to the company's

estimate which contains no provision for depreciation of equipment. With the rather modest rate of 2 per cent for such depreciation, a deficit would still result. By deficit is here meant net corporate deficit. We are assuming that the company is entitled to earn a fair return on at least the amount of its funded debt: that is, it should in all events be permitted, if possible, to earn at least the interest on its bonds. An appraisalment would probably show that it is entitled to earn a return on a much larger sum. There is included in the tables an item of \$190,820 as interest on floating debt. This is practically all on account of loans made for the support of the Hudson Valley Railroad. The item of non-operating income is \$273,787, and this is practically all income derived from the Hudson Valley Railroad. If Hudson Valley matters were to be eliminated entirely, the deficit would be about \$80,000 more than appears in the table.

It is altogether probable that with conditions unchanged except as to the rate of fare the reduction in the number of passengers may be more than 5 per cent as assumed in column 3 and less than 10 per cent as assumed in column 6. If it proves to be much more than 5 per cent the net corporate income disclosed by column 3 would disappear.

In estimating the probable results of a seven cents cash fare with certain possible ticket rates, the assumption was made that 75 per cent of the passengers would use tickets. If it be assumed that only 50 per cent would use tickets, and that there would be a 5 per cent reduction in the remaining number of cash passengers, the passenger revenues should be \$2,958,727. Assuming that only 25 per cent would use tickets, the passenger revenues should be \$3,004,599. A deficit would still remain. On the basis of six tickets for forty cents there would be very little change in the estimate made in column 8 whether it be assumed that 50 per cent or 25 per cent would use tickets. As a practical matter, the reduction in rate for the tickets would be so small that

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very few would use them and the calculations based on a cash fare would really be applicable.

Reluctant as the Commission is to permit any further increase in rates there seems to be no escape, and no method has been devised whereby any lower or different rate than seven cents for each zone can be justified.

In the brief presented on behalf of the Chamber of Commerce of Albany, several pertinent suggestions are made to the general effect that efforts should be made to increase revenue by means of increased travel rather than by increased rates, but the most important of the detailed suggestions involve the construction of new lines, the purchase of new equipment, and similar capital expenditures. In the present condition of this company, in the present condition of traction companies generally, and in the present condition of the money market, to withhold relief at present because the addition of a large amount of fixed capital might render such relief unnecessary would be like withholding food from a man until he should raise a crop on land he does not own and has no means of acquiring. Undoubtedly some of these expenditures for extensions and improvements are highly desirable and should be made as soon as the credit of the company and general conditions make it possible to finance them. It may well be that certain suggestions made by counsel for the chamber involving changes in routes and operation would tend to increase travel. The attention of the company is called to these suggestions, and they will undoubtedly be adopted if found practicable. The company certainly can have no desire to avoid measures within its power which promise increased revenues without disproportionate increase in expenses.

The order should be limited to one year from the time of entry in order to preserve the limit in the waiver of the Troy franchise. The term should also be brief because of the vestige of hope remaining that a return to more nearly normal conditions or some happy discoveries may soon permit

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a decrease in rates. The writer has not ventured to express this hope in strong terms. When six cents fares were first demanded he entertained a strong hope that they would not be of long duration. Instead of their passing away, seven cents, eight cents, and ten cents have become common rates of fare even in the largest cities of the country. These have been reached in spite of the efforts of those most familiar with traction financing and operation to devise some method by which solvency of traction companies could be sustained otherwise than by such increases.

Chairman Hill and Commissioners Fennell and Kellogg concur; Commissioner Barhite not present.

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In the Matter of the Complaint under sections 71 and 72, Public Service Commissions Law, of HARRY N. HOFFMAN as Mayor of the City of Elmira *against* ELMIRA WATER, LIGHT AND RAILROAD COMPANY as to rates proposed to be charged for natural gas; also in respect to examination of the gas property and books of said company by the city. [Case No. 6759.]

Petition or Complaint of ELMIRA WATER, LIGHT AND RAILROAD COMPANY under sections 71 and 72, Public Service Commissions Law, for permission to increase natural gas rates in the city of Elmira, town of Elmira, and town of Southport, Chemung county. [Case No. 6907.]

Certain "overheads" are not included in the cost of definite units of tangible property, and as overhead cost of replacement is usually absorbed in general expense accounts of current operation there is practically no realized depreciation in these items, and there should not be any annual charge in operating expenses to meet the claimed annual depreciation thereon.

When a company in the past has not had a fair return, including an annual depreciation charge, and its plant is in first class condition and operating at full efficiency, the theoretical accrued depreciation need not necessarily be deducted from the present fixed capital account, provided that when items of property are renewed or replaced the same be charged against the renewal and replacement fund in the proportion that fund bears to the total theoretical accrued depreciation at the time of replacement, and the balance be then charged against surplus otherwise applicable to dividends.

Decided January 22, 1920.

Appearances:

Boyd McDowell, Esq., Corporation Counsel, City of Elmira.

Beekman, Menken & Griscom (by M. G. Bogue), 52 William street, New York city; and *Stanchfield, Lovell, Falck & Sayles* (by Halsey Sayles), Elmira, for Elmira Water, Light and Railroad Company.

FENNELL, *Commissioner*:

These cases although bearing separate numbers were tried as one case and are so treated. For brevity the Elmira Water, Light and Railroad Company is hereinafter called the Company and the City of Elmira is called the City.

January 20, 1919, the Company filed a proposed schedule of rates for natural gas to be effective February 19, 1919. February 17, 1919, the City filed its complaint [case No. 6759]. February 18, 1919, the City obtained an injunction restraining the Company from putting such rates or any increased rates into effect until such rates had been passed upon by the Public Service Commission as provided in an agreement theretofore made between the City and the Company.

June 10, 1919, the Company filed a petition to increase its natural gas rates [case No. 6907]. The City's complaint in case No. 6759 was treated as the answer to the Company's petition in case No. 6907.

It was agreed upon the hearing that the rate base should be fixed before the case proceeded further. To expedite proceedings and to eliminate, so far as possible, the expense and duplication of work involved in a contested property valuation it was arranged that three engineers representing the Commission, the City, and the Company, respectively, should work jointly and prepare a report showing the facts regarding property in the gas department of the Company. The report was filed July 15, 1919. Hearings were resumed July 30, 1919; briefs and reply briefs were filed by each side, the last one being filed October 7, 1919.

The first artificial gas plant in the city was built in 1852. The Company, on its incorporation in 1900, took over the artificial gas plant and business in the city.

In 1902 certain individuals made a contract with the Potter Gas Company, a Pennsylvania corporation, for a supply of natural gas. Shortly after, these men organized the Chemung County Gas Company. In 1902 the contract

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with the Potter Gas Company was assigned by them to the Chemung County Gas Company. In 1908 the Chemung County Gas Company was merged with the Elmira Water, Light and Railroad Company. In 1915 the manufacture and sale of artificial gas was discontinued. November 4, 1917, a modifying contract was made between the Company and the Potter Gas Company providing, among other things, for an increase in price for natural gas to be paid to the Potter Gas Company based on an increased rate to the Company's consumers in the city.

As the only question now presented for decision is the fixing of the rate base, the further question of the reasonableness of operating expenses, including the cost of gas to the Company, which involves the determination of its rights to obtain gas from the Potter Gas Company under the modifying contract above mentioned, will not be passed upon at this time. The conference report is summarized as follows:

Physical property in use.....	\$597,921.09
Physical property not in use.....	122,739.37
Other fixed capital items.....	100,000.00
Accumulated or theoretical accrued depreciation:	
Agreed to	98,619.92
Claimed by City but not agreed to by Company.....	10,140.33

At a subsequent hearing it was testified that certain property to the extent of \$4718.58 which had been included in the item Physical property not in use should have been included in item Physical property in use. With this change made the summarized figures of the conference report are as follows:

Physical property in use.....	\$602,639.67
Physical property not in use.....	118,020.79
Other fixed capital items.....	100,000.00
Accumulated or theoretical accrued depreciation:	
Agreed to \$98,619.92 plus \$962.64 (depreciation on \$4718.58)	94,582.56
Claimed by City but not agreed to by Company.....	10,140.33

The Company claims that the rate base should be at least \$750,000, which amount it claims is made up as follows:

Property used in distribution of natural gas:	
(a) From page b, Conference report.....	\$597,921.09
(b) Additional property not included in Conference report, but testified to by Mr. Gough, also set forth in Company's exhibit 8, page 8.....	4,718.58

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(c) Mains useful and to be used in distributing natural gas (not included in Conference report. Page 4 Company's exhibit 2 and testimony of Mr. Gough, pages 60 et seq)	\$11,791.70
(d) Station works and structures claimed to be useful and claimed entitled to return.....	15,827.17
(e) Working capital (Company's exhibit 4).....	20,000.00
	<hr/>
	\$650,058.54
(f) Going value, at least.....	100,000.00
Total	<hr/>
	\$750,058.54

The City claims the rate base should not be in excess of \$506,802.75 made up as follows:

Cost of used and useful property as per Conference report...	\$597,921.09
Cost of artificial gas mains transferred from "not used" to "used" property July 30, 1919.....	4,718.58
Total cost.....	<hr/>
	\$602,639.67
Less accrued depreciation as per Conference report:	
Agreed to \$93,619.92 corrected to.....	\$93,433.95
On overheads.....	10,140.33
	<hr/>
	\$509,195.39
On \$4718.58 above.....	962.64
Total accrued depreciation.....	<hr/>
	104,536.92
Present value of physical property now being used.....	\$496,102.75
Property not being used (nothing).....	
Intangible item (nothing).....	
Working capital	8,700.00
Going value (nothing).....	
Fair value or rate base.....	<hr/>
	\$506,802.75

The first item in the Company's list of claimed values which is objected to by the City is marked item (c), being gas mains formerly used for artificial gas and which the Company claims it can use to the advantage of the plant by carrying an auxiliary supply of gas from the plant to some of the more distant sections of the city and tapping into the distributing system at those points, thereby equalizing the distribution. As the Company is furnishing natural gas which seems to carry sufficient pressure when the supply is available such auxiliary mains are not then needed. When the supply is not available the auxiliary mains are not useful as the natural gas mains are more than sufficient to carry the entire supply. If and when a supply of gas, natural, artificial, or mixed, shall be furnished to the City by this plant, and these artificial mains still in the streets but now unused are again used as above indicated, then their value should

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be included in a rate base. Until then the value should not be included. The mains of the old artificial gas system were in use for a great many years. It must be presumed that they had "earned themselves out" to a large extent. There is however a further reason for disallowance. The artificial gas was first in the field. The natural gas came in as a competitor. It is true that in this case the competition was not of the deadly kind because the same interests controlled both companies, but the operation of economic laws in spite of this control created a competitive condition. Eventually the companies were brought into one company and finally the manufacture and distribution of artificial gas ceased. It is clear that after the combination it was found that an economic handling of the gas situation required the discontinuance of the manufacture and distribution of artificial gas, and therefore the non-user of the artificial gas system. No doubt this was thought at the time to be in the interest of sound economy on the part of the Company, but it would seem that the combination making it possible to use the more profitable system ought to work for the benefit of the public as well as the Company. The use of the more profitable system having produced an economic benefit to the Company it ought not now to be allowed, in addition, a return on the unused artificial gas mains while they remain unused.

Item marked (d) is taken from the Conference report, allocation of artificial gas department:

<i>Works and Station Structures</i>	<i>Used</i>	<i>Not Used</i>
Piping and wiring (37.5%).....	\$120.70	\$200.74
<i>Building</i>		
Coke storage, store (50%).....		
Retort house, heating (25%).....		
Purifier room, store (100%).....		
Tool room, store (100%).....		
Meter room, office (50%).....		
Governor house (100%).....		
Total cubic feet used, 78,035.....	8,974.03	14,924.47
Outside railroad trestle (50%).....	240.70	240.70
Brick paving (50%).....	225.06	125.05
Railroad siding (50%).....	136.21	136.21
Totals	\$9,596.70	\$15,627.17

The value of the unused portion of the above not being actually used or at present usable should not be allowed at present. If and when again used the value should be included in a rate base to the extent used. As stated above regarding item (c) there is more conjecture than reasonable probability that the portion of works and station structures mentioned will again be used and the decision as to item (d) should be the same as to item (c).

Item (e) is also disputed, the Company claiming \$20,000 for working capital, the City insisting on an allowance of not more than \$8700.

The Company had on hand for materials and supplies (1918).....	\$7,722.79	
A reasonable allowance for materials and supplies would be.....		\$8,000.00
The operating expenses for 1918 less the cost for gas and general amortization was...	33,407.75	
Using $\frac{1}{4}$ (six weeks) of a year we reach the figure of.....	4,178.47	
A reasonable allowance would be.....		4,500.00
Amount paid for gas purchased was.....	126,073.94	
Ordinarily this amount would be in manufacturing costs, but here the gas is furnished by an outside company and does not require the usual expenditures. The Company receives monthly from its customers enough to pay its monthly bills for gas to the Potter Gas Company so that the Company does not need an allowance for working capital to cover this item. However, a company of this size should have a reasonable amount of cash on hand and such reasonable amount would be..		
		5,000.00
A working capital should be allowed in the amount of.....		\$17,500.00

On the treatment of the theoretical accrued depreciation there is a sharp conflict. The first question is the depreciability of the following:

Engineering and superintendence.....	\$2,897.15
Law expenses during construction.....	120.74
Injuries during construction.....	120.74
Taxes during construction.....	241.48
Miscellaneous construction expenditures.....	965.92
Interest during construction.....	5,784.30
Total.....	\$10,140.30

It is claimed by the City that capital expenditures of the above nature are depreciable and that the amount set forth above as accrued depreciation should be recognized.

So far as the items above mentioned, commonly called "overheads," are not included in the cost of definite units of

tangible property, they are not according to the most common practice decreased when property is retired. There is, therefore, no realized depreciation in these items. On the other hand, the overhead cost of replacements is in large measure absorbed by the general expense accounts of current operation, so that there is little or no duplication in overhead capital costs. Whether this is, as a practical matter, the most accurate method of accounting need not be discussed here. As long as it is the method in general use, it is needless to compute a theoretical depreciation reserve to cover retirement losses on property that is never retired. To do so would be to require the consumer to pay in the rates an additional depreciation allowance that would never be used for replacement, since overhead replacement costs would be ordinarily met out of current operating expenses, and a constantly increasing depreciation reserve would thereby be created. If original overhead costs were taken from capital account, when tangible property is retired, they would have to be treated in the same manner as direct costs. Under such circumstances we think the element of depreciation does not enter into the above items, and there should not be any annual charge in operating expenses to meet the claimed annual depreciation thereon.

This leaves the agreed theoretical accrued depreciation of \$94,582.56 to be disposed of. The Company has a balance of \$24,020.31 in its reserve for such accrued depreciation.

ACCRUED DEPRECIATION

Depreciation, using the term in the meaning which includes obsolescence, inadequacy, etc., is continuous, and it varies with the kind of material, the use to which the material is put, kind of maintenance it receives, development of the art, growth in business, salvage value, and many other factors, and therefore the growth or extent of such accrued depreciation is, at any time, an estimate. The depreciation being a certainty but the ratio of progress of same being an

estimate, good business judgment requires that careful estimates be made, and based upon such estimates ratios of depreciation be adopted, and a fund accumulated to meet the depreciation when it becomes realized. It is realized in this sense only when renewals or replacements are actually made.

The annual depreciation charge is a method of spreading these renewal and replacement costs over a period of years so that the burden does not fall entirely within the year when such replacements are actually made.

The Public Service Commissions Law permits the Commission, in the fixing of rates, to take into account this necessity for equalizing replacement costs and allow for it in determining the "reasonable return," so that the plant may be kept in efficient operating condition.

A company in setting aside annually some portion of its revenues in a reserve to meet the depreciation when renewals become necessary generally uses the reserve so set aside for the purchase of new property of the nature of additions or betterments. In this way the company is enabled to make such additions and betterments without at the time borrowing on notes or issuing small amounts of capital securities, but the transaction is really a borrowing by the company from the depreciation fund. When this is done the depreciation reserve will be represented by an equal amount of additions and betterments or other property not yet capitalized. Later, when renewals and replacements become necessary, the amount of additions and betterments is capitalized in a reimbursement proceeding, the moneys received are repaid to the depreciation fund thus making them available for renewals and replacements. Until such capitalization occurs the company has been earning on additions and betterments paid for out of funds which it received, not as capital, but in the form of rates from consumers. This fund is in its nature a trust fund. However, as this reserve might better be busy than idle it is proper to use it to purchase new

property. When so invested the company having borrowed the money from the fund should pay interest for it or deduct the balance in the reserve from its total assets to determine the rate base. Such reserve, so invested, does not represent money which the company could disburse in dividends but money which has been received from its customers and has been set up on its books as not being disburseable in dividends but held to pay for renewals and replacements.

It is the duty of utility companies not only to render service but to protect the operating integrity of the plant that renders the service. Such a company may include, in rates, a sum to keep up the plant and preserve its usefulness at full efficiency. If the company does not collect from the consumers the amount of this loss but continues to pay the normal return on its original investment, it is paying dividends out of capital. If it lessens its dividends in order to provide a depreciation fund, it is contributing an equivalent part of its capital to the public service without compensation. If the owners of a company do not include such depreciation charge in their rates and set up on their books a reserve representing the company's liability for the amount so received, then as the plant and property of the company are steadily deteriorating the day comes inevitably when renewals and replacements will have to be made and there will be no fund set aside for the purpose. It will be the duty of the Commission to order the renewals so that proper service may be rendered. The company must make such renewals. As it has failed to build up a proper reserve and, as renewals are not capitalizable, except perhaps temporarily, such renewals when made by the company will have to be paid out of profits which otherwise would go to dividends, and whatever debt is permitted to provide such renewals will have to be amortized out of the net earnings of the company and dividends reduced accordingly.

Of course the foregoing applies to a company that has not made an average reasonable return, including, of course,

the annual depreciation charge, over a period of years. If the company has made such an average reasonable return, then the logic of such a condition would require that the company, having received revenues from rates that were high enough to meet the depreciation by a reserve and having taken that portion of the revenues which might and should have been so used and disbursed same as dividends, the stockholders have, in fact, paid themselves in enlarged dividends out of the body of the plant to the extent of the depreciation. In such a case the full theoretical accrued depreciation should be deducted from the rate base.

From all of which it seems reasonable to conclude that if the utility company has not received, because of insufficient rates, sufficient revenues to provide a reasonable return including enough to meet the accruing depreciation, and if the owners of the company decide to pay some dividends and not set up a sufficient accrual reserve, they should not be compelled to deduct from the rate base, in a given case, the estimated amount of the theoretical accrued depreciation, but on the other hand should be required to keep the plant up to full efficiency by proper renewals and replacements which in such a case will have to be paid for, when made, out of moneys which otherwise might be disbursed in dividends. It is the duty of the owners of a public utility to manage its affairs so that its service to the public, whether present or future, shall be at full efficiency. The policy of neglecting to provide a sufficient annual amount for the depreciation reserve only puts off the evil day; it does not prevent that day from coming. On the other hand, if the company has not made a fair return and the consumers have not been charged in current rates from year to year, any appreciable amount to meet such accruing depreciation the present public should not require such a company to make good at once the full amount of such theoretical accrued depreciation by deducting the whole of the theoretical accrued depreciation from the rate base. The public has had the benefit of rates

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which were lower by the amount of the allowable depreciation ratio which was not included. The public has not paid nor the company received the "annual depreciation ratio". The company has not availed itself of the opportunity to build up a reserve. That was a gain to the consumers reflected in rates.

The amount of the loss to the company will some day be fixed when renewals and replacements must be made. When that day comes the company will have to meet the loss. However, in the meantime, if the company delivers and the public receives full service, it seems hardly fair to use the ratios of annual depreciation which were meant to estimate the annual sum to be set aside and apply them as a definite measure of actual present loss in value to that amount and deduct the same from the rate base. The estimate may prove, as the years go by and in proportion to the care taken of the units of property, somewhat wide of the mark.

In determining whether the agreed theoretical accrued depreciation should be deducted from the rate base, it is necessary to find whether or not this Company in the past has received an excessive return. Using the figures set forth on page 3 of City's Exhibit No. 1 of August 13th, which may be presumed to contain the best showing from the City's standpoint, we find from 1909 to 1919, using an 8 per cent return, an accumulated deficit of \$18,336. Using the Company's figures which are presumably the most favorable to it, an accumulated deficit is arrived at of \$304,000, and crediting 8 per cent return for eleven years on \$100,000 of intangibles, the deficiency would be, as claimed by the Company, \$216,000. It seems from the foregoing and from all the evidence in the case that the Company has not made such an excessive return on the value of its property in use in the public service that an amount equal to the accumulated theoretical accrued depreciation should be deducted from the rate base in this case.

The Company, in the Conference report, accepts the

accumulated or theoretical accrued depreciation of \$93,619.92. To this should be added \$962.64, depreciation on \$4718.58, transferred from "not used" to "used" property. It set up on its books as of December 31, 1918, a balance in the account for accrued amortization (gas) \$24,029.31. There is thus unprovided for about \$70,000 of theoretical depreciation that it is conceded by the Company has already accrued in the property. As to the balance of \$24,029.31, it would seem that this balance should be regarded as a trust fund which the Company borrows to use in the purchase of additions and betterments or for other company purposes. Regarding this fund, therefore, as a trust fund, and the Company properly borrowing from the trust fund for capital expenditures, it would seem an appropriate and reasonably simple method of procedure to allow the Company a return upon the undepreciated value of its property and charge the Company 6 per cent on the annual average balance of the trust fund, the interest to be added to the fund. The decision herein is on the theory that the balance in the reserve fund will be so treated. As to the balance of about \$70,000 which is not provided for, and which the Company claims because of insufficiency of return it was unable to provide for, it should not be deducted from the rate base at this time, but when the items of property to which that depreciation was applied are actually retired 70/94 of the realized depreciation which shall be apportioned to the time prior to July 15, 1919, the date of the Conference report, should be charged against gross income, that is from the amount that would otherwise be available for surplus and dividends. As an alternative to this method the Company may, from time to time, out of such gross income, make extra accruals to the reserve so that retirements in full may be charged to it. While it is clear that this Company has not been setting up a sufficient annual depreciation charge, although doing better recently, it is expected in view of the fixing of the rate base in the

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above manner that hereafter a sufficient annual charge shall be made for depreciation. So long as the property operates at full efficiency this theoretical accrued depreciation, even though agreed as to amount, should not, as above stated, be deducted from the rate base because it is after all only an estimate, and the fact that the retirement is not yet necessary is fairly substantial evidence that the various units are rendering proper service up to the time of retirements. However, when that time comes and the *actual* depreciation is definitely known, then the stockholders of the Company must accept the burden falling upon them at that time for their failure to provide in advance sufficient annual charges to meet the annual accruing depreciation.

When it is stated that the plant of this Company is maintained at full operating efficiency it is not meant that full service is given at all times. There is in fact serious and sometimes full failure of service. This is due to the lack of supply of gas. When gas is furnished by the Potter Gas Company the distributing plant of this Company is sufficient to meet the service demands.

INTANGIBLES

On October 8, 1906, the Elmira Water, Light and Railroad Company filed a petition with the Commission of Gas and Electricity to increase its capital stock, to issue first consolidated mortgage bonds, and to use the proceeds for certain purposes. Among these purposes was an exchange of \$350,000 of bonds and \$350,000 of preferred stock for a like amount of bonds and stock of the Chemung County Gas Company. The Commission allowed the Elmira Water, Light and Railroad Company to issue \$450,000 of its preferred stock which stock, or the proceeds thereof, should be used to acquire the \$350,000 of bonds and \$350,000 of stock of the Chemung County Gas Company. In the proceeding before the Commission of Gas and Electricity there were filed certain affidavits as to value. The affidavit of Edwin E. Witherby, engineer in chief of the United Gas

and Electric Company, contained, among other things, the following:

That on said date the Company had material on hand to the value of \$8149.11; that in deponent's opinion the cost to reproduce the said street mains, service lines, regulators and stations, valves and meters on the 1st day of November, 1906, would be \$365,265.42.

There was also an affidavit of Richard S. Storrs who stated —

that the following is a true and correct statement of the tangible assets of said Company on June 30, 1906:

Lines, mains, meters, services, etc.....	\$332,679.56
Material and supplies on hand.....	8,695.07
Accounts receivable.	10,983.23
Surplus on hand.....	31,709.09
Total.	\$384,066.98

The \$450,000 of preferred stock was issued and exchanged for the property of the Chemung County Gas Company. According to the above affidavits, the value of this tangible property was either \$373,414.53 or \$384,066.98. However, in the present case the Conference report having taken into account the tangible property of the Company and set it up in two items, physical property in use, and physical property not in use, there is included in these groups of property in the Conference report whatever tangible property of the Chemung County Gas Company came into the possession of the Elmira Water, Light and Railroad Company. So that there is really an intangible of \$100,000. This intangible was recognized by the Company in carrying the same on its books.

The question is whether or not the \$100,000 should be allowed as part of the rate base in this case.

The Commission of Gas and Electricity allowed the Elmira Water, Light and Railroad Company to take over the Chemung County Gas Company and permitted the payment therefor at \$450,000 in preferred stock. We should not, even if we cared to, question that decision. But permission to issue capital in an uncontested capitalization or merger case should not be regarded as a determination sufficient to preclude investigation of such values in a sub-

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sequent rate inquiry. Does the \$100,000 of intangibles represent the kind of value contemplated in a rate case? Was there an actual investment of that amount in something that entered into the plant or property that was being used for the public? There is a close question here. The original owners of the Chemung County Gas Company undoubtedly expended time, effort, and energy in organizing that company, in getting a natural gas contract from a producing company, and bringing natural gas into the city of Elmira. The lower selling price of natural as against artificial gas and the much greater heat value of the former, about 1000 B. t. u. as against the latter with a required standard of 585 B. t. u., are decided advantages to the City and to the consumers of gas. There were two gas companies in the city, one making and distributing artificial gas, the other distributing natural gas. They were in competition but only such competition as would occur where the same interests substantially controlled both. Good judgment was exercised in joining them and a certain elasticity should be permitted in allowing additional capitalization to permit consolidation and promote unity and economy of operation. This is for the mutual benefit of the Company and the consumers. But this flexibility in capitalization to permit the give and take necessary to consolidate should not necessarily become and be a fixation of value for a subsequent rate case. The value in a rate case must be based on such evidence as may be produced, and while the capitalization so allowed is some evidence of value it is not conclusive. In this case it hardly seems that the issuance of the extra \$100,000 of preferred stock over the tangible value of the Chemung County Gas Company by permission of the Commission of Gas and Electricity established a value of that amount in a rate case. That \$100,000 allowance in capitalization measured the extra portion or share which Chemung County Gas Company should take from the common fund for dividends rather than an investment of

\$100,000 in property actually in use or to be used by the public. While as between the artificial gas plant and the natural gas plant it was entirely appropriate that such intangible value should be capitalized in favor of the natural gas plant, it would seem that the merger of two companies under such conditions would hardly warrant imposing rates on the public increased sufficiently to make a return upon that \$100,000.

Counsel for the Company urges an allowance of \$100,000 or more for "going value" because of past "inadequacy of return". In dealing with the question of depreciation in this case the lack of a full return, including an amount to cover such depreciation, has been considered and because of that lack the full theoretical accrued depreciation has not been deducted from the rate base. It seems that is as far as the Commission ought to go in this case. The statute providing for the fixing of a maximum rate which will allow a reasonable return is not of itself a guarantee that a company will at all times make a reasonable return, and it seems that if a company chooses to conduct its business over a considerable period of time without increasing its rates or asking for an increase of rates that it should not be permitted to capitalize that failure of full return and have future rate payers for all time pay a return on the total of that loss. Of course this does not include the loss which might be more aptly described under the heading "get going" value. There is not sufficient proof here of that kind of loss to make an allowance therefor. The Commission has, therefore, seen fit not to include an allowance of "\$100,000 or greater sum" as going value in this case.

The rate base should be —

Physical property in use.....	\$602,689.67
Working capital.	17,500.00
Total.	<u>\$620,189.67</u>

Commissioners Irvine and Kellogg concur; Chairman Hill concurs in result; Commissioner Barhite not present.

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Petition of AUSABLE FORKS ELECTRIC COMPANY (INC.) under section 68, Public Service Commissions Law, for permission to construct an electric plant in the town of Jay, Essex county, and for approval of the exercise of a franchise therefor received from the town; and under section 69 for authority to issue \$25,000 in common capital stock. [Case No. 6595.]

Permission to exercise an unlimited franchise refused where the field was already occupied by another public utility corporation, but without prejudice to applicant to present a limited franchise.

Decided January 27, 1920.

Appearances:

Charles J. Vert, Plattsburgh, for the applicant.

Fred A. Torrance, Ausable Forks, representing various citizens of the town of Jay and also the Town of Jay.

Thomas O'Connor, Waterford, for the Northern Adirondack Power Company, in opposition.

George E. O'Connor, Waterford, for the Northern Adirondack Power Company.

FENNELL, Commissioner:

The hamlet of Ausable Forks has about two thousand one hundred inhabitants, and is located on both sides of the Ausable river, one side being in the town of Black Brook, Clinton county, the other side being in the town of Jay, Essex county.

On March 11, 1911, a franchise was granted to the Keeseville Electric Company, now the Northern Adirondack Power Company, by the local authorities of the Town of Jay. August 24, 1911, the Public Service Commission approved the exercise of a franchise by the Northern Adirondack Power Company in the town of Jay, and on December 6, 1911, an order was made authorizing a mortgage and issuance of bonds to extend the company's line

to Ausable Forks and construct a distribution system therein. The line was extended to Ausable Forks, and the distribution system was constructed on the Jay side of the river. August 12, 1912, the Northern Adirondack Power Company was granted a franchise in the town of Black Brook. November 13, 1912, the Public Service Commission granted permission to the Northern Adirondack Power Company to exercise a franchise in Black Brook. The company did not develop the Black Brook side.

In 1897 the J. & J. Rogers Company, a manufacturing company, installed a small lighting plant for the purpose of lighting the company's store. Later, current was carried to a small hotel, then to residences of certain officers of that company. From this small beginning there gradually grew up a substantial electric business in Ausable Forks.

December 12, 1912, the Northern Adirondack Power Company filed a complaint with the Public Service Commission against the J. & J. Rogers Company, objecting to the latter company engaging in the electric business as it was a business corporation and without legal authority to engage in such business.

These rival companies continued in the electric business until a decision of the Supreme Court, June 22, 1918, declaring the J. & J. Rogers Company had not the right to engage in the electric lighting business [*Public Service Commission, Second District, v. J. & J. Rogers Co., defendant, and Northern Adirondack Power Company, intervenor*, 103 Misc. 711.] This decision was appealed to the Appellate Division and affirmed [184 App. Div. 705].

On September 20, 1918, the Ausable Forks Electric Company (Inc.) petitioned the Public Service Commission for permission to acquire property and to exercise franchise rights in the town of Jay, Essex county; to take over the physical electrical equipment and rights of the J. & J. Rogers Company, and to issue stock to the extent of \$25,000 for the purchase of such electrical equipment and rights, and to purchase water power, water-wheel, and generator.

No such "rights" to do an electric business can be taken over as the J. & J. Rogers Company had no such rights. Mr. Justice Rudd used the following language in his decision: "By a violation of the law it has not secured an implied franchise." "It" referring to the J. & J. Rogers Company.

The disposition of the main question in this case makes unnecessary a decision at this time as to the issuance and sale of stock and the expenditure of the proceeds of same.

The contest between J. & J. Rogers Company and the Northern Adirondack Power Company has been severe and has extended over a long period of time. Without setting forth in detail the various steps in that contest it may be considered that the record herein fairly shows that the owners of the Keeseville Electric Company, owners of the Northern Adirondack Power Company (successor to the Keeseville company), and the owners of the J. & J. Rogers Company were on friendly terms when the Keeseville company received its franchise from the Town of Jay and when the Northern Adirondack Power Company received its franchise from the Town of Jay; that these franchises would not have been granted against the opposition of the Rogers company; that the Rogers company did not oppose the extension of the lines of the Northern Adirondack company to Ausable Forks and the exercise of its franchise therein, and that the Northern Adirondack company was not then opposed to the Rogers company conducting its electric business in the manner and to the extent then conducted; that the Northern Adirondack Power Company issued stocks and bonds and expended the avails thereof to extend its transmission line to Ausable Forks and to construct its distribution system there without any agreement on the part of the J. & J. Rogers Company that the Northern Adirondack Power Company would have a monopoly of the electric business in Ausable Forks; that the Northern Adirondack Power Company took the business chance of there being a sufficient demand for its electric energy to warrant the

extension of its transmission line to Ausable Forks and the construction of its distribution system therein.

Assuming the facts above stated as being fairly established, should the application be granted?

The Commission should give protection to the business of utility companies that have been duly authorized to enter the utility field and have made expenditures relying upon that authorization, at least to the extent of protecting them against ruinous competition. Such competition while it works to the temporary advantage of the public is, in the long run, disastrous to the public and to both companies. This protection should certainly be thrown about a company that gives or can be made to give good service. There are two reasons for this rule. It tends, in the long run, to give a steadier, better service to the public, and it is also fair to those who enter a new field and build it up that they should profit by their initiative and energy and be allowed to reap the financial fruits of their labor. In this case, regarding this applicant as being in the place and stead of the J. & J. Rogers Company and successor to that company's duties and equities, the second reason does not apply. The J. & J. Rogers Company was first in the field and had it partly developed. The apparent equities between the companies would seem to warrant a decision that both companies be returned to the *status quo ante*, each with a free opportunity to develop according to the capacity of each.

Right at this point in the logic of the case comes the stumbling block. It may be assumed that with the power of the J. & J. Rogers Company in Ausable Forks and in view of the recent past and present attitude of those who control these rival companies, such a free competition would probably mean the wiping out of the Northern Adirondack Power Company so far as its business in Ausable Forks is concerned and the use and value of its transmission line to that point, with consequent disastrous results to the company. The Northern Adirondack Power Company is in Ausable Forks under authority of this Commission. Its

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securities, issued under like authority, are outstanding, and the company's business and its securities should have reasonable protection. The Commission should not give its consent to the exercise of a franchise allowing free and unrestricted competition between these rival companies.

The question has been raised as to the relative capacity of these rival companies to serve the public. It may be fairly found that the Ausable Forks Electric Company, because of its connection with and backing of the J. & J. Rogers Company and because of its having access to the latter company's sources of power, would have a larger amount of power and of a more dependable character than the Northern Adirondack Power Company can develop at its plant; that the Northern Adirondack Power Company has not rendered first-class service at times, although it is only fair to say that its service is steadily improving but will be subject to such interruptions and fluctuations as are necessarily incident to dependence upon a single water power and a single transmission line. Ausable Forks has electric fire fighting apparatus. Several sources of power would give additional protection in case of a large fire. A single source of power and a single line might prove sufficient, but if either the source or the line failed in such an emergency the results would be extremely serious. Complaints against the service of the company have been quite numerous in the recent past, but it appears from the nature of the complaints that they are due, at least in part, to the desire on the part of some portion of the population of Ausable Forks to favor the Ausable Forks Electric Company (Inc.) as against the Northern Adirondack Power Company.

One of the chief reasons heretofore urged by the J. & J. Rogers Company in its own behalf was the amount of free lighting, particularly free public lighting, which that company had furnished and was furnishing in the hamlet of Ausable Forks. The petitioner urges the same reason in its behalf and agrees, if permitted to exercise its franchise and construct its lines, that it will furnish substantially the same

free lighting. If the Northern Adirondack Power Company had been in the field first and had developed the field, a proposition of the above nature should have no weight in opening the field to the company proposing it. Free lighting to some customers, no matter who the customers may be, is in its essence an unjust discrimination. Of course there may be an exception to this rule where the contribution comes solely from the pockets of the owners of the company and does not affect adversely the rates of the paying consumers and the integrity of the utility.

The former giving of free lighting and the petitioner's agreement to continue free lighting should have no weight in determining the issues raised in this proceeding. If a company has the right to contribute such free lighting as it desires, under the above conditions, it also has the right to refuse free lighting at any time and whenever its owners so determine. As to the agreement which petitioner states has been entered into with the J. & J. Rogers Company whereby, among other things, petitioner agrees to continue the free lighting of streets, public buildings, etc., as heretofore furnished by the J. & J. Rogers Company, and to furnish power for fire fighting apparatus in the hamlet of Ausable Forks free of charge as was done by the J. & J. Rogers Company heretofore, it is questionable whether a public utility can bind itself by such a contract to carry out an agreement which may in the future under different conditions or under different ownership of the J. & J. Rogers Company cause an undue and unfair burden to fall upon the owners of the petitioner. However, as that is not a provision in the franchise but in the agreement between the J. & J. Rogers Company and the petitioner, it is not necessary at this time to make a determination as to same.

All of which leads naturally to the conclusion that where private interests are in such bitter conflict over a public utility business, due regard for the public interest as well as the fair equities between the parties themselves would bring about a merger of companies or some other mutual

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handling of the business, particularly where there are equities on both sides.

Long and strenuous efforts were made by former Commissioner Carr and have been made by the sitting Commissioner in this case to bring about some practical and fair solution. Letters were received from the conflicting interests on January 3, 1920, and January 13, 1920, stating that the rival companies can not agree upon terms.

The Commission being without power to compel a merger or an agreement mutually satisfactory and protective, only one practical decision seems possible. As the granting of a petition to exercise such franchise without limitations would undoubtedly result in the wiping out of the Northern Adirondack Power Company to the extent above mentioned, an order should be made denying at this time consent to the exercise of the unlimited franchise as it is now presented, but without prejudice to the Ausable Forks Electric Company (Inc.) to present a franchise limiting its operations substantially to the business done by the J. & J. Rogers Company at the time of the construction of the transmission line of Northern Adirondack Power Company to Ausable Forks. This permission to present such a limited franchise is not to be regarded as an expression of opinion at this time by this Commission that consent to exercise such limited franchise will necessarily be given.

An order has been made accordingly.

All concur.

In the Matter of the Complaint of MARTIN DEGNAN, General Chairman Grievance Committee, Brotherhood of Railroad Trainmen, Delaware and Hudson Railroad, *against* UNITED STATES RAILROAD ADMINISTRATION, DELAWARE AND HUDSON RAILROAD, as to alleged violation of section 54-a Railroad Law (Full Crew Law), in respect to passenger trains which are operated between Troy, N. Y., and Rutland, Vt. [Case No. 7134.]

The provisions of section 54-a of the Railroad Law, commonly called Full Crew Law, are not applicable to passenger trains of less than five cars.

Joint employees of a railroad company and an express company operating over its line are not disqualified from performing the duties of baggagemen, in addition to handling the express on the train, where they have performed such duties for over twenty years, although they are primarily paid by the Express Company and their names do not appear upon the roster of the employees of the railroad, and it is not shown that they were duly qualified trainmen before entering upon the discharge of their duties as baggagemen.

Quaere, as to whether the Full Crew Law applies to trains on a branch line operated less than fifty miles continuously within the State.

Decided February 3, 1920.

Appearances:

Arthur B. Lanphier, 86 State street, Albany, attorney for complainant; and *Martin Degnan*, complainant, in person.

Lewis E. Carr and *Newton R. Cass* attorneys for respondent.

KELLOGG, Commissioner:

The complaint in this proceeding alleges a violation of section 54-a of the Railroad Law, commonly known as the "Full Crew Law".

The trains in question are operated between Troy, N. Y., and Rutland, Vt., over the line of the respondent and the Boston and Maine Railroad.

The trains consist, as alleged in the complaint, of one engine, one day coach, one smoker, and one combination car consisting of a mail compartment, a baggage compartment, and an express compartment. The trains are manned by a crew consisting of one engineer, one fireman, one conductor, and one flagman.

The trains, therefore, consist of three cars, one of which contains a baggage compartment, in addition to the engine. They are manned by a crew of four men in all. Section 54-a of the Railroad Law provides as follows:

Full crews for certain trains.—No person, corporation, trustee, receiver, or other court officer, shall run or operate, or cause to be run or operated, outside of the yard limits, on any railroad of more than fifty miles in length within this state, a freight train of more than twenty-five cars, unless said train shall be manned with a crew of not less than one engineer, one fireman, one conductor and three brakemen; nor any train other than a freight train of five cars or more, without a crew of not less than one engineer, one fireman, one conductor and two brakemen, and if the train is a baggage train or a passenger train having a baggage car or baggage compartment without a baggageman in addition to said crew; nor any freight train of twenty-five cars or less without a crew of not less than one engineer, one fireman, one conductor and two brakemen; nor any light engine without a car or cars, without a crew of not less than one engineer, one fireman and one conductor or brakeman. Each separate violation of the provisions of this section shall be a misdemeanor punishable by a fine of not less than one hundred dollars or more than five hundred dollars. Each train or light engine run in violation of the provisions of this section shall be deemed to be a separate offense.

It is contended by the complainant that the second clause of the above section is applicable to all trains except freight trains of five cars or more, and therefore it would be applicable to all passenger and baggage trains, and would be applicable to all freight trains of less than five cars.

A hasty reading of the clause without regard to its context might lead to this conclusion, but considered with the other clauses of the section it becomes entirely clear that it has no reference to freight trains whatsoever, but only to baggage or passenger trains. Its meaning would be more

clearly expressed if a comma followed the word "train" where it appears the first two times in the clause.

The first clause of the section has reference to freight trains of more than twenty-five cars, which must be manned by a crew of not less than an engineer, a fireman, a conductor, and three brakemen. The third clause of the section has reference to freight trains of twenty-five cars or less, which must be manned by a crew of not less than one engineer, one fireman, one conductor, and two brakemen. The fourth clause provides that a light engine without cars must be manned by a crew of not less than one engineer, one fireman, and one conductor or brakeman.

The second clause, therefore, can consistently have no reference to freight trains which are entirely covered by the first and third clauses, and must refer only to baggage or passenger trains where they consist of five cars or more, which must be manned by one engineer, one fireman, one conductor, and two brakemen, and if there is a baggage compartment there must be a baggageman in addition.

In addition to the suggestion that this second clause can not refer to freight trains, because that subject is fully and completely covered in the other clauses of the section, the same conclusion is reached when we consider that if the contention of the complainant is correct, and it applies to all passenger trains, then we would have a requirement of statute whereby a train of one car containing a baggage compartment would have to be manned by an engineer, a fireman, a conductor, two brakemen, and a baggageman, a result so incongruous that it could not, of course, have been contemplated by the legislature.

Upon the hearing another cause for alleged protests developed somewhat outside the express allegations of the written complaint. It is claimed that the men on these trains were not competent because their names did not appear upon the roster of the baggagemen of the Delaware and Hudson lines, selected by promotion from duly qualified

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and properly examined trainmen, but that they were employed by the Express company, and were therefore not qualified baggagemen.

It appeared that for many years, between twenty and thirty, these men had been employed upon these trains, and performed the duties of both expressmen and baggagemen. Prior to the recent ruling of the Railroad Administration their names had been carried upon the payroll of both the Express and Railroad companies, and they were paid a proportionate part of their salary by each of these companies. Recently, however, they were placed upon the payroll of the Express company and paid by it alone, the Railroad company in turn paying to the Express company, and not to the men themselves, a portion of their wages.

For this reason their names do not appear upon the payroll of the Delaware and Hudson, and because they were joint men their names have not appeared upon the roster of the employees of the Delaware and Hudson, it being shown that in cases of such joint employees their names sometimes appear upon the lists of the Railroad company and sometimes upon the lists of the Express company, and not usually upon both.

Men who have been employed for so long a period of time, and whose faithfulness and entire efficiency stands unchallenged on the record, can not be held to be incompetent from the mere fact alone that their names did not appear on the roster of the Railroad company, a condition fully explained by the facts above stated.

They have been employed for so long a time, and the genesis of their service is for that reason veiled so much in obscurity, that it does not appear whether or not they served as trainmen prior to their present employment. In any event, men who have actually properly performed the duties of the position for a quarter of a century, certainly are as competent to perform such duties in the future as new men promoted from the ranks of trainmen, however severe the

examination and tests to which the latter may be subjected. There is no suggestion that the men have become incompetent from advancing age or other intervening disqualification. The contention that the men are incompetent, and the operation of the trains is therefore unsafe and should be corrected by this Commission, can not be sustained.

It is further contended by the respondent that trains operated over this line of railroad are not subject to the "Full Crew Law," because there is not fifty miles of continuous operation thereof within the State of New York. To this contention several answers at once suggest themselves for consideration:

First, although there is no continuous operation for fifty miles in the State of New York, the aggregate distance within the State over which these trains are operated exceeds that distance.

Second, at Castleton the road connects with another branch of the Delaware and Hudson system, which in turn connects with the main line, making a railroad much more than fifty miles in length within the State of New York, all owned and operated by the same corporation.

Third, inasmuch as the entire operation from Troy to Rutland is more than fifty miles, this statute provision may be held to be violated even if less than fifty miles are within the State, under the construction placed by the courts upon a somewhat similar statute prohibiting the heating by stoves of passenger cars on other than mixed trains, the terms of which statute provided that it should not apply to railroads less than fifty miles in length. (*People v. N. Y., N. H. & H. R. R. Co.*, 55 Hun 409; *affd.* 123 N. Y. 635.)

In view, however, of the fact that the movements in question were not in any sense within the provisions of the "Full Crew Law," and there is no proof of incompetency of the operatives or insecurity of operation, it is unnecessary to pass upon the force of the interesting contention of the

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respondent, that the provisions of the law are not applicable in view of the limited operation of the trains in question within the State.

The complaint should be dismissed.

All concur.

Complaint of WEST WINFIELD *against* CHARLES G. SENIF
(West Winfield Electric Company) as to increased prices
for electricity proposed to be effective January 1, 1920.
[Case No. 7147.]

A proposed rate for electricity of twenty cents per kilowatt hour,
with a minimum monthly charge of \$1.50 in a small municipality with
a very restricted demand considered, and held not to be unreasonable.

Decided February 3, 1920.

Appearances:

Charles J. Thomas, Herkimer, for the complainant.

Lewis, Foley & Foley (by Arthur J. Foley), 36-42 Mann
Building, Utica, for the respondent.

KELLOGG, Commissioner:

On October 28, 1919, the respondent, Charles G. Senif,
doing business under the name of the West Winfield
Electric Company, filed with this Commission a new tariff
for the supply of electric light in the village of West Win-
field. This tariff, bearing date of October 27, 1919, by its
terms was made effective January 1, 1920. It increased the
previously existing rates so that the straight line meter rate
was raised from seventeen cents to twenty cents per kw.h.,
and the minimum charge per month was increased from
a dollar and a-quarter to a dollar and a-half.

The trustees of the village on November 28, 1919, filed a
complaint against these rates on the ground that the same
were unreasonable, and the issue joined by the answer of Mr.
Senif, denying the unreasonableness of the rates, form the
matter for determination here. Hearings have been held at
Albany and Utica with appearances as above noted.

West Winfield is a small incorporated village having,
according to the census of 1915, a population of 788. It is
situated in the extreme southwesterly corner of Herkimer
county.

In 1915 the respondent constructed the electric light plant in question, and entered into contracts with the village to furnish electric street lighting, and also to pump the water necessary to furnish a water supply to the inhabitants of the village. The motive power is obtained by the operation of what is known as a "producers' gas set," and the water pumping and electric light propositions are so interwoven that they must be considered together.

Practically the entire work of maintaining the plant in question, thereby furnishing both the electric light and water to the village, is performed by the respondent individually.

On account of the smallness of the municipality affected, and its consequent practical inability to employ experts to make a valuation of the property involved, Mr. C. A. Volz, assistant chief of the division of light, heat, and power of this Commission, inspected the property in question and made a valuation thereof. This valuation was subsequently announced to be satisfactory to the village, and is not materially different from the valuation made by an expert of the respondent, Mr. Sweet, which is also in evidence.

As a result of this investigation, Mr. Volz fixed the value of the property of this respondent, including the fixed capital, working capital, materials and supplies at \$15,794.09. This does not include any so called "going value".

It is claimed by the respondent that to this aggregate investment, which represents the present value of the physical property, should be added the so called "going value". This argument is based upon the decision of the Court of Appeals in the case of *People ex rel. Kings County Lighting Company v. Willcox*, 210 N. Y. 479.

It is urged that the deficiency for each of the four years of operation of this plant, in fair return upon the valuation of \$15,000, should be added to the tangible capital. Such deficiency should not always be added for rate making purposes, but where a company is actually established and is earning a fair return, the deficiency occurring in the years in

which the business was being built up may perhaps properly be considered as part of the investment. Certainly such annual deficiency can not be considered in cases such as the one now under consideration, where a company never is able to yield a fair return. If this were so, a company which never earned a fair return would be constantly increasing in value for rate making purposes, and the greater the deficiency, and the less the success of the company, the greater would become its estimated value to be considered in fixing a rate. This, of course, was not the intention of the court in the decision referred to.

The actual gross revenue in 1919 was \$5888.37. The proposed increase of rates would yield an additional \$600 if there were no decrease in consumption.

The operating expenses and taxes for the year 1919, which will probably be at least as large for the current year, were \$4854.24. This would leave a net revenue of \$1634.13 per annum with the new rates in force, less whatever loss may occur from decreased consumption due to increased rates.

This allows an item for salary and wages of labor of \$2760. Most of this work was performed by the respondent himself. This figure includes all of the labor and services performed in the enterprise, which includes, as has been stated, not only the electric lighting in the village but the pumping of water for it. This expenditure certainly can not reasonably be considered to be excessive.

The net revenue indicated above of \$1634.13 per annum takes no account of annual depreciation, for which the respondent is entitled to be reimbursed. This is estimated at \$580 per year, which would reduce the net revenue from operation to \$1054.13, or a return of 6.7 per cent upon the actual capital invested, less all loss of consumption from increased rates.

The plant of the respondent is located upon village property, and was so located pursuant to contracts for furnishing

electric light and pumping water, which will expire during the current year. If these contracts are not renewed, so much of the property as is located upon such village land, including the power plant, will have to be removed, and will then be only actually worth its salvage value.

It is urged because this event may happen, the property should not be valued at its full value in place, but only at its salvage value. However much force there may be in that theory, it has not been taken into consideration, for the reason that it would ultimately work in favor of the respondent, and suggest the propriety of a still higher rate than that now under consideration, for the reason that if at the expiration of a certain time this plant would have to be removed from its present location, and would thereby lose much of its value, respondent would now be entitled, and has been entitled during the years of his temporary occupancy, to collect in rates a sufficient sum to make good the permanent loss of value of his power plant by reason of its contemplated removal at the expiration of his term of occupancy, in addition to a reasonable return upon the investment.

This contention, therefore, works against the village rather than in its favor. As it is apparent from the figures hereinbefore submitted that the rates set forth in the tariff, as filed, will yield only 6.7 per cent on the actual capital invested, less decreased consumption from increased prices, any further considerations which tend to fortify the position of the respondent are entirely unnecessary.

It is quite true that the rate sought to be charged is a high rate, but it must be borne in mind that this is a small community and the demand is small, there being only 133 commercial customers of the plant, the entire consumption of electricity for the last calendar year reported being 16,678 kw.h. by such commercial users, in addition to 2173 hours of consumption by the 42 municipal street lights.

Various other communities of the State, by reason of similar disadvantageous situation, are required to pay an equal or higher rate, as follows:

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<i>Municipality</i>	<i>Electricity per kw. h.</i>
Canaseraga30
Canisteo20
Dundee20
Hunter20
Long Beach .....	.25
Red Hook .....	.20
Rhinebeck .....	.20
Southampton .....	.20
Tannersville .....	.20
Tivoli .....	.20

Inasmuch as the cost of supplies and materials entering into the production of electricity, under conditions prevailing at present, are unusually high, the period to be fixed in the order, during which the rates of the schedule now filed shall be effective, ought not to exceed a period of one year, or until February 1, 1921.

An order should therefore be entered holding that the rates set forth in the proposed tariff are not unreasonable, and permitting the collection of the rates prescribed therein for the period specified, and until the further order of the Commission.

All concur.

In the Matter of the Complaint of THE INLET SUPPLY COMPANY of Inlet, Hamilton county, *against* RAQUETTE LAKE RAILWAY COMPANY as to absence of agent from Eagle Bay station on said company's railway during the winter months. [Case No. 7281.]

This Commission should, even in sparsely settled localities and at non-agency stations, make proper regulations for safe delivery of freight to consignees.

A railroad company should not be ordered to maintain an agent at a station in the winter time when the revenues are inadequate to warrant such service, but the security of freight consigned to such stations should be insured by other regulations.

Decided February 10, 1920.

Appearances:

H. J. Williston, Inlet, and *G. A. Kenwell*, Inlet, complainants, in person.

C. E. Snyder, Herkimer, attorney for the respondent; *Lewis Crane*, Division Freight Agent; *C. H. Calkins*, Superintendent; *G. D. Dager*, Trainmaster; and *Maurice Callahan*, Superintendent, Raquette Lake Railway Company.

KELLOGG, Commissioner:

The Raquette Lake Railway Company owns and operates a railroad from Carter, formerly Clearwater, on the Adirondack division of the New York Central railroad, easterly to Raquette Lake, a distance of about nineteen miles. It has been in operation for about twenty years. Its location in the heart of the Adirondacks renders it essentially a summer road. During the winter months it receives some slight revenue, principally from the shipment of pulp wood and other forest products, and small freight consigned to the few people living on its route.

It is seldom able at the close of a year to show an excess of receipts over the actual operating expenses. In only six

years of the seventeen that have elapsed since 1902, during which period only are records available, has there been an excess of revenues over the operating expenses and taxes.

Since the fiscal year ended June 30, 1913, there has always been an annual deficit, where the operating expenses and taxes exceeded the gross revenue. In the last calendar year for which the figures were available, 1918, there was a net deficit of operating expenses over all income of \$22,884.48, to which deficit must be added the annual taxes of \$1440.71, making an aggregate of \$24,325.19, which is about 70 per cent above the gross revenue. In other words, the receipts of the railroad are about three-fifths of what it costs to operate and pay the taxes on it, without considering any return on the investment or any reserve for depreciation.

On September 30, 1918, in case No. 6596, this company applied under section 85 of the Railroad Law, to this Commission for permission to cease operation of its railway during the ensuing winter season. The application was denied solely because it was made so late in the season that various mill owners had already made arrangements for cutting wood pulp in the vicinity, on the transportation of which over this line they were dependent for the operation of their mills, for which reason it would be unfair that they should be deprived of these transportation facilities, on which they had relied, by granting an application made so late in the season.

That application seems not to have been renewed for the present season, due to the fact, perhaps, which developed on the hearing, that other lumber operations are now in process, the revenues from such operations being available to the Railway company.

The foregoing is a general description of the line, and discloses a railroad operation very unusual in its nature, and one which is entitled to special consideration in the questions which arise affecting it.

The principal station intermediate the termini is Eagle Bay, distant about ten miles from Carter and about nine

miles from Raquette Lake. The station is on the Fulton chain of lakes near a large summer hotel, and undoubtedly in that season receives considerable custom from tourists. With the exception of one family, there is no one living near the station in the winter time. About a mile away there are a few other families, but not until the hamlet of Inlet is reached, about two miles from the station, is there any noticeable settlement. Here there is a population of about two hundred people in winter, served by three general stores. This is the only station along the line of the railroad except a flag station at Minnowbrook, by which a few families are served in the winter time.

Since the construction of the railroad the station at Eagle Bay has not been kept open in the winter months, the summer agent arriving in May and leaving in October. This rule has been subject to exceptions during the time of the heavy ice harvesting operations at Raquette Lake, during the pendency of which a telegraph operator has been maintained at Eagle Bay for the protection of the heavy train service incidental to these operations. The station has a room for the storage of freight, and also has rooms upstairs in which a section hand sleeps at night. He is supposed to keep the station warm on train days and to keep it clean, so that passengers may here await the coming of trains, under the usual conditions supposed to be maintained at these non-agency stations. The evidence developed that the duty of keeping this station cleaned and heated was not at all times properly discharged. The attention of the Railroad company in this connection is called to this condition in order that it may not continue, and that on days when trains arrive and depart this station may be kept properly cleaned and comfortably heated for a reasonable time prior to the advertised arrival of such trains and until after their departure.

Four times a week, during the winter season, a combination passenger and freight train leaves Raquette Lake at 1:15 p. m., passes Eagle Bay at 1:45, and arrives at Carter

at 2:30. Returning, it leaves Carter at 4 p. m., passes Eagle Bay at 4:45, and arrives at Raquette Lake at 5:15. This train is almost invariably on time on its trip from Raquette Lake to Carter, but on its return trip, due to the necessity of waiting for the connection with the New York Central, it is occasionally but not frequently late, and such lateness when it does occur is very seldom of any substantial degree.

The trouble arising in this matter is due to the fact that l. c. l. freight is handled at this point by leaving it in the station without guard or lock, if the consignees are not there personally or by agent to receive it or arrange for its delivery when the train arrives.

Under the provisions of the bills of lading, as it is claimed, the railroad ceases to be liable as soon as it places the freight in its station accessible to the consignee. In this manner losses have occurred on occasions, and it becomes impossible to locate the place of loss, it being claimed by the Railroad company that the packages were delivered at the station, and it being claimed by the consignee that it never received them.

On account of the uncertainty of the day of arrival of the freight, the consignees are not always present when trains arrive, and it is not always possible for them to tell in advance as to what day the freight will arrive. In these instances, if they are not present, either personally or by representative, the freight is left in the station as indicated, and loss occurs occasionally but not frequently.

It would seem to be entirely beyond reason to require the maintenance of an agent at this station during the winter months under the circumstances detailed. It would also seem to be unreasonable for the Railroad company to leave freight in an unlocked and unguarded room against the wish of the consignee, and at his risk, and this practice should be corrected.

Section 26 of the Public Service Commissions Law provides—

Every corporation, person or common carrier performing a service designated in the preceding section, shall furnish, with respect thereto, such service and facilities as shall be safe and adequate and in all respects just and reasonable.

Section 49, subdivision 2, of the same statute, further provides—

Whenever the commission shall be of opinion, after a hearing, had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances, or service of any such common carrier, railroad corporation or street railroad corporation in respect to transportation of persons or property within the state are unjust, unreasonable, unsafe, improper or inadequate, the commission shall determine the just, reasonable, safe, adequate and proper regulations, practices, equipment, appliances and service thereafter to be in force, to be observed and to be used in such transportation of persons and property and so fix and prescribe the same by order to be served upon every common carrier, railroad corporation and street railroad corporation to be bound thereby; and thereafter it shall be the duty of every common carrier, railroad corporation and street railroad corporation to observe and obey each and every requirement of every such order so served upon it, and to do everything necessary or proper in order to secure absolute compliance with and observance of every such order by all of its officers, agents and employees.

It would seem therefore to be the duty of this Commission to make a reasonable and sufficient provision in regard to safe delivery of freight, even in this remote mountain settlement. Freight consigned to this point should not against the wish of the consignee be left in an open room in the depot and such action deemed delivery releasing the carrier from further liability.

Unless some proper arrangement to the contrary, approved by both the consignee and the carrier, is made, in all cases where freight is consigned to this station, and the consignee does not appear on the arrival of the train, either in person or by a duly authorized representative, to claim it, it should be deposited in the freight room of the station prior to the departure of the train, such room should be left securely locked, and notice of the arrival of the freight sent to the consignee.

The conductor of the train, and the train crew, could without any material addition to their duties, and without serious delay to the train, if the schedule were properly arranged, unlock the room at each passage of the train, and deliver all freight brought there on previous arrivals to those present desiring and entitled to such delivery. The duty of the carrier should not be deemed discharged, or its liability terminated, prior to such delivery.

It is suggested that the carrier ought not to be held liable as the freight room might be broken into. This argument, however, if extended, would defeat all liability of carriers for goods stored in their possession after the time of arrival and before delivery.

The risk at this point is not exceptional as the station is occupied by one of the section hands at night, and marauders must be very few in the winter time in this sparsely settled neighborhood.

An order should be entered accordingly.

All concur.

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Petition or Complaint of EMPIRE STATE RAILROAD CORPORATION under subdivision 1, section 49, Public Service Commissions Law, and section 181, Railroad Law, for permission to increase passenger fare in the city of Oswego; also that operation of one-man safety cars be permitted. [Case No. 7039.]

The propriety of permitting the operation of one-man cars on street surface railroads considered, and such operation permitted in the city of Oswego under certain specified conditions.

Decided February 10, 1920.

Appearances:

Nottingham, Nottingham & Edgcomb (by William Nottingham and E. I. Edgcomb), 530-541 Onondaga County Savings Bank Building, Syracuse, as attorneys for applicant.

John R. Pidgeon, Oswego, its Corporation Counsel, for the City of Oswego.

Hon. John Fitzgibbons as Mayor of the City of Oswego.

Francis D. Culkin, Oswego, as attorney for, and *John F. O'Connor*, Oswego, as president of, Local Division 681, Amalgamated Association of Street and Electric Railway Employees of America.

Rev. John F. McLaughlin, Oswego, in person.

Purcell, Cullen & Purcell (by Henry Purcell), Watertown, as attorneys for The New York Central Railroad Company.

KELLOGG, Commissioner:

On October 1, 1919, the Empire State Railroad Corporation, operating a street surface railroad in the city of Oswego, filed with this Commission its petition, alleging that the rate of fare then collected in that city of five cents was inadequate, and requesting the Commission to fix seven cents as the maxi-

imum fare to be charged there. It also requested permission to operate what is known as a "one-man safety" car on its local lines in Oswego.

The company took the position that the deficit in street car operation in the city of Oswego could not be met alone by an increase of fare. It was contended that the operation of these one-man cars, resulting in lessened expense of operation by decreasing the crew from two men to one, and requiring less power than the cars now used on account of their lighter weight, would permit a more frequent service which it was hoped and expected would result in a larger number of passengers being carried, and thus offset to some extent any loss which might result from diminution of traffic consequent upon the increased fare sought to be charged.

The petition in regard to the one-man car was evidently addressed to this Commission under the provisions of subdivision 2 of section 49 of the Public Service Commissions Law, which gives this Commission power to determine whether "regulations, practices, equipment, appliances," etc., of street railroad corporations are "unjust, unreasonable, unsafe, improper, or inadequate," and which gives this Commission power to "determine the just, reasonable, safe, adequate, and proper regulations, practices, equipment, appliances, and service thereafter to be in force".

Before the company made the additional investment necessary for acquisition of these cars, it felt that the situation should be examined by this Commission and its permission obtained to their operation. This it would seem was a proper precaution on the part of the company, and one which should be met by a determination and decision by this Commission as to whether the operation of such cars in the city of Oswego is, if properly regulated, safe, proper, and adequate.

A hearing was had upon this petition in the city of Oswego on October 4, 1919. At that hearing it appeared that the city authorities had waived the franchise restrictions limiting the fare to five cents, and had given consent to the fixing

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of a maximum fare of seven cents under certain specified conditions.

As to the propriety of operation of one-man cars, however, the city then refused to take sides. The corporation counsel urged that the proceedings be separated, and that action be taken in regard to the fare increase independent of the application to operate a one-man car. He stated his position, as follows:

Now, we feel that these are two separate, different applications. The Common Council of the City of Oswego, during all the negotiations that brought about this amendment to the franchise that provides for a seven cent fare were particular to inform the Street Railway Company that they had nothing to do with the matter of the one-man car, that they refused to approve it or disapprove it, and it was not considered by them in this matter of the amendment to the franchise.

This proposed severance of the two divisions of the proceeding was acceded to after discussion by the sitting Commissioner.

Evidence was taken as to the financial operation of the company. It appeared that during the year ended August 31, 1919, its operating revenue in the city of Oswego was \$80,644.22; its operating expenses during this same period were \$94,259.06, thus showing a deficiency in operating expenses alone of \$13,614.84; so that a deficit of about 17 per cent in operating expenses over revenue is shown without any reserve for depreciation, without any consideration of taxes paid, which amounted that year to \$3637.69, and without consideration of any return whatsoever on the investment.

It further appeared that the company had never received any net revenue from this Oswego operation since it had acquired ownership of the road in 1917, and the experience of its five predecessors in title since the construction of the street railroad in 1885, punctuated by mortgage foreclosures and receiverships, indicates that at no time was the operation of this enterprise financially profitable.

The great increase in the cost of labor and materials, under present conditions, has brought about a situation where the

company failed in this marked degree to meet even its operating expenses. The operating expenses stated were under normal conditions of outlay, without, however, proper expenditure for keeping its tracks and road bed in proper condition. Since August 31, 1919, large additional expenditures have been incurred in extensive street re-paving and in re-laying a substantial length of track ordered by this Commission.

The increase of fare to seven cents will not, of course, as experience has shown elsewhere, result in a full proportionate increase of revenue. In the city of Oswego, where much of the street car travel is optional and not necessary, the increase in fare will undoubtedly result in a diminution of revenue paying passengers. If the increase in fare results, as is estimated in the evidence, in an increase of 20 per cent in revenue, the company will indeed be fortunate. And an increase even to that extent can not be hoped for without an increase in the frequency of the service, so that prospective passengers may be assured that undue waiting for cars to carry them to their destination will be avoided. Otherwise in a city of this size, with a population of about twenty-five thousand, rather compactly built, people under ordinary conditions would, in many instances, prefer to walk.

Upon this financial showing this Commission, shortly following the hearing referred to, under date of October 7, 1919, made an order permitting the collection in the city of Oswego of a maximum fare of seven cents, in accordance with the consent given to that effect by the municipal authorities.

The question of granting permission to operate the one-man car was held open for further consideration. Various other hearings were had, in Oswego, Albany, and Syracuse, and much evidence was taken on the subject. The granting of the permission applied for was opposed by the local division of the Amalgamated Order of Street and Electric Railways of America. It was contended that the operation of

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these cars would be unsafe, and would impose an undue burden upon the operatives.

From the financial statement above referred to, it is obvious that even with an increase in fare, taking into consideration the consequent decrease in travel and the necessity for increased frequency of service, further relief is necessary. Operating expenses must be kept at a minimum consistent with proper and safe service, or local street car operations in Oswego, and many other of our municipalities, must cease unless and until a lower level of prices for labor and materials prevails.

If by the operation of a one-man car, service can be increased so as to enhance the receipts, and at the same time the cost of operation lessened, a highly desirable result will be arrived at, not only from the standpoint of view of the company, but what is much more important, from the point of view of the public, upon whom the burden of paying a rate sufficient to at least operate the plant and maintain it in proper condition, must eventually rest. It is quite certain that if cars, in a municipality of this size, can be successfully operated by one man, the burden should not be imposed, which must ultimately fall on the fare paying public, of employing, at present high wages, two men to do the work which can properly be performed by one. If this added economy in operation is feasible, it may result in avoiding the necessity of further increases of fare. It may perhaps even warrant a reduction.

These cars have come into frequent use of late years, in order to help solve this problem of increased and increasing cost of operation, in many municipalities. There are over twenty-three hundred in use and ordered for use in over two hundred municipalities in this country. They have lately been put in operation in Brooklyn. One-man cars are operated in certain municipalities in this District.

Of course these cars are not available where travel is heavy, but in municipalities of this size, where the grades

are not heavy, and in traffic of the nature encountered here, it would seem that their operation is practicable, and that no undue burden is imposed upon the operative. His duties are much less onerous and exacting than those of a driver of a large motor bus, who, in addition to the various duties which must be performed by the operator of a one-man car, has to guide his vehicle through traffic.

The question, however, as to the safety of the operation must be controlling. If these cars can not be operated with equal or greater safety to the public, under conditions existing in Oswego, as a car manned by two men, permission for their operation should of course be withheld.

In order to solve this mooted question, careful and thorough examination of these cars have been made by the chief of the division of electric railroads of this Commission, and it is apparent that under proper regulation they can be operated with safety in the city of Oswego.

The cars known to the art as "one-man safety" cars, or "Birney safety" cars, are operated by one man stationed at the front end, at which point passengers board and alight from the car, the motorman collecting the fares, issuing transfers, etc. The cars may be operated from either end. They are equipped with a number of devices tending to secure safety. The motorman controls and operates the folding steps and doors. The car can not be started while the doors are open. The equipment is such that the motorman is obliged to keep his hand on the controller handle, or his foot on the pedal, to keep the car in motion. Otherwise the current is shut off, the air-brakes are applied, the tracks sanded, and the doors unlocked. Thus, if the motorman becomes disabled or loses his power to operate the car, it automatically comes to a standstill.

It appears from the record on the offer of the objectors that various accidents have occurred in operation of the street cars in Oswego. They all occurred in "two men" operation. There is nothing to indicate they would have occurred, or

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will hereafter occur, with greater frequency if the operation be by one man instead of two. It may be that in certain conditions the automatic devices are more dependable than the sometimes uncertain "human element".

Evidence has been given which indicates that in cities where these cars are in operation there are fewer accidents, in view of these automatic safety devices, than on cars used in the same municipalities operated by two men without such devices. Interviews with operatives of these cars by a representative of the Commission indicate that the duties are not unduly fatiguing or exacting, and that the men are well satisfied with their positions.

Cars of this type have been carefully inspected for the purpose of ascertaining what changes or improvements in construction should be made in order to add to their safety, and the use of such cars should be permitted only after compliance with the following conditions:

1. In the braking system, box jaws must be placed at all points where members are connected with clevis and bolts, so that any bolt may break or drop out of place without interfering with the proper operation of the brakes.

2. Clevis connections on the bottom of the air-brake cylinder lever which are subject to stress and wear, and which might possibly break, should be replaced with a solid connection with box jaws.

3. The cable connections to the live cylinder leverage for hand-braking should also be equipped with box jaws, the same as the air-brake connections.

4. All air pipes now exposed to the weather, in which condensation might occur, should be so arranged or protected as to prevent them from freezing.

5. A movable guard should be placed across the rear exit door to prevent it from being opened by passengers thrown against it.

6. Each end of the car should be equipped with a grab rod extending across the full width of the car.

7. The car should be equipped for winter use, with track scrapers and flangers.

8. The controller should be arranged so that the current will be broken under the floor of the car instead of in the controller above it, as at present.

9. A light should be located in a position to reflect on the step when the car door is open.

10. Passengers must not be permitted to stand in the forward vestibule of the car.

In view of the fact that there are several grade crossings of steam railroads, both on main lines and industrial sidings, in the city of Oswego, the safety of operation which is now secured by a flagging of electric cars over these crossings by the conductor must be adequately compensated for by other methods. In regard to such crossings, compliance with the following conditions should be required, which will secure even greater safety of operation of such cars over these crossings than is now enjoyed by the method of operation of cars on which conductors are employed:

1. All cars on the electric tracks to be flagged over the three grade crossings of main line tracks by regular flagmen employed for that purpose.

2. That a signal system be installed by means of which the flagman at First street can signal the flagman at Bridge street of the departure of trains from First street for Bridge street, this signal to be arranged so that it can be operated by the flagman at First street without his being obliged to go to the flag shanty for that purpose; also to be equipped with a tell-tale assuring the flagman at First street that the signal is received at Bridge street.

3. That at the crossings of industrial sidings on Mitchell Street road and First street, all electric cars come to a full stop not less than 30 feet from the nearest rail of the steam track, the operator of the car to go ahead on to the center of the steam track, and after looking in both directions, return to his car; and after again observing the conditions on

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the steam track in each direction and assuring himself that no train is approaching, shall proceed over the crossing. On First street there are three crossings of industrial sidings. These may be considered as one, the rule to apply at the first crossing in each direction. But all electric cars shall be brought to a full stop before proceeding over any of them.

4. At the crossing on West Bridge street, on account of the descending grade, all eastbound cars shall be brought to a "Dead Stop" not less than one hundred and fifty feet from the nearest rail of the steam track, after which they shall proceed in compliance with the above mentioned rule.

5. That the Empire State Railroad Corporation make an arrangement with the steam railroad companies by which all movements on the industrial sidings over the crossings above mentioned shall be made under flag preceding the train, cars, or engine.

6. That all crossings of steam tracks shall be equipped with metal trolley guards.

One other consideration remains to be disposed of, and that is in regard to the snow fighting ability of these cars. They have not been thoroughly tested in severe weather in this climate, and their lightness of weight indicates that they will not be able, of themselves, to make a very successful struggle against the snow storms frequently encountered in the climate of Oswego. If these cars are to be operated there, the company, in order to give adequate service at such times, must be equipped with adequate and sufficient snow fighting facilities to keep the tracks clear for these cars, and not depend on their own ability to assist to any material degree in keeping the tracks clear for themselves.

If such cars are placed in operation during the present Winter, the company should keep in reserve at least four of its present double-truck cars, to be used in emergency, in case their snow fighting equipment is not adequate to keep the tracks open for the one-man cars.

The motorman of these cars, if operated, should never be

permitted to reverse or back them. He can not, from his position in the front of the car, see what is immediately behind it and below the rear windows. Serious injury might be caused to those crossing the tracks directly in the rear of a car and out of the range of vision of the motorman stationed at the other end. The cars should never be operated except from the controller in the end of the car facing the direction toward which it is moving.

By compliance with the foregoing conditions, the operation of these cars can be conducted with safety at least equal to that enjoyed under present "two men" operation; and unless these conditions are faithfully complied with, their operation should not be permitted. No element of added danger from such operation should for one moment be tolerated. Abandonment of all local lines would be preferable.

It appears that since the hearings on this case closed, and notwithstanding the position taken by the corporation counsel of that city, above quoted, an ordinance has been passed by the common council requiring the operation of electric cars by two men in the city of Oswego. This action was taken relying for its validity to some extent on the decision of the United States Supreme Court in the case of *Sullivan v. The City of Shreveport*, decided December 15, 1919, reported in 40 Supreme Court Reporter 102.

The writer is informed that the Mayor has vetoed this ordinance, and its passage over his veto is not probable.

In any event, in view of the delegation by the Legislature of powers to this Commission to pass upon the safety of operation of street railroads by subdivision 2, section 49 of the Public Service Commissions Law, above cited, and in view of the difference in local conditions between Oswego and Shreveport, as to heavy grades and other matters, upon which the decision referred to was founded, the question of the validity of a local ordinance on the subject is a matter to be determined by the courts if tested by the railroad company and insisted upon by the city. It should not in any

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event affect the determination of this Commission in the discharge of its duties imposed by statute.

Inasmuch as the operation of one-man cars in the city of Oswego is reasonable and safe under the conditions hereinbefore detailed, an order should be made permitting their operation in that municipality, but only upon compliance with such conditions.

Chairman Hill and Commissioners Irvine and Barhite concur; Commissioner Fennell not present.

Petition of HADLEY LIGHT AND POWER COMPANY, INC., under section 68, Public Service Commissions Law, for permission to construct an electric plant in the town of Hadley, Saratoga county, and for approval of the exercise of a franchise therefor received from the town; and as to transfer of an electric plant. [Case No. 6943.]

A town board in 1912 undertook to create a lighting district, and constructed and undertook to operate a lighting plant therein. Tax-payers obtained an injunction against the operation of the plant, and it was sold under direction of the court to one G. Certain members of the town board then incorporated an electric company with a view to lighting the lighting district. They afterward, and before any action, resigned as directors of the corporation, and assigned their stock to others who were thereupon elected directors, and application was the same day made to and granted by the town board for a franchise to operate an electric plant in the lighting district. The town board made a contract with the corporation for street lights, and G. contracted to sell the electric plant to the corporation for stock in the corporation in such amount as the Public Service Commission should allow. The corporation then made this application for permission to construct and for approval of the exercise of the franchise.

Held 1. That another electric corporation having no franchise in the town and unable to procure one was without standing to contest the proceeding on the ground that the new corporation would introduce improper competition with the objecting corporation.

2. The members of the town board having no interest in the applicant corporation at the time of the granting of the franchise, the franchise is not void in law.

3. There being no evidence of pecuniary advantage to the members of the town board and no evidence of actual bad faith, the question whether the franchise is voidable should be determined in a direct attack thereon before a judicial tribunal. The Commission should not undertake to avoid the franchise.

4. The Commission having already, in 1912, undertaken to authorize the construction of the plant, the plant being in existence and G., the proposed purchaser of the corporate stock, entering upon the business merely as incidental to a much larger business already conducted by

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him and being willing and apparently able to operate in spite of an apparently very limited market, the Commission grants the relief sought.

FENNELL, *Commissioner*, concurring:

Whether the original incorporation of the applicant by members of the town board was and remains void, *quaere*: This is a judicial question outside the jurisdiction of the Commission.

Decided February 24, 1920.

Appearances:

B. K. Walbridge, Saratoga Springs, as attorney for applicant.

Beecher S. Clothier, Glens Falls, as attorney for Riddell Electric Light Company of Luzerne, creditors, and also for certain taxpayers.

IRVINE, *Commissioner*:

This application by the Hadley Light and Power Company, Inc., while in form for permission to construct an electric light plant in the town of Hadley, the approval of the exercise of a franchise, and the transfer of an electric light plant from Joseph Gatti to the company, embraces in fact merely the approval of the exercise of the franchise and the transfer of a plant already constructed, although undoubtedly future additions are contemplated.

The hamlet of Hadley is in the town of Hadley, in Saratoga county. The hamlet of Luzerne is in the town of Luzerne, in Warren county. The two hamlets are separated by the Hudson river in its upper reaches and at a point where it is less than one hundred feet in width. The case developed a neighborhood wrangle. Those chiefly concerned might well have adjusted their differences to their common advantage and probably to that of the public. They were advised so to do, and ample cooling time has been allowed but without result.

In 1912 the Town of Hadley undertook to create a lighting

district embracing the hamlet of Hadley, and constructed and undertook to operate a municipal lighting plant therein. A generator was installed in a mill in the hamlet, poles and wires were erected, with other equipment, and street lights installed. Some commercial lighting was undertaken. In 1914 the Riddell Electric Light and Power Corporation constructed a lighting plant in the village of Luzerne. Subsequently some attempt was made to extend the operations of the Hadley plant by adding one or more lighting districts. Taxpayers' actions were instituted, resulting in a determination that the Hadley construction and operation was illegal, and further operation was restrained. The plant already constructed was sold by a receiver under direction of the court, and purchased by Joseph Gatti, who had in the meantime acquired the mill property containing the generating system. The present applicant was then incorporated with a view to conducting a lighting business in the hamlet of Hadley and a new lighting district was created, we presume regularly because nothing appears to the contrary and no attack is made on that question. The new corporation made a contract for the purchase of the plant from Gatti. This contract is conditioned upon approval by the Public Service Commission of this application. What purports to be a franchise to occupy the streets and public places of the lighting district was granted to the corporation by the town board of Hadley, and a contract entered into for the furnishing of fifty street lights at \$15 per annum per light.

The opposition to the granting of the petition is by the Riddell corporation, and by M. B. Riddell as a taxpayer of the town of Hadley. The Riddell corporation asserts its right to oppose on the ground that it is against the policy of the Commission and against public policy to permit a competing company to enter a field already occupied by an existing corporation able and willing to provide adequate service. A fatal answer to this is that the Riddell corporation is not already in the field. Its franchise is in the town of Luzerne.

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It has no franchise in the town of Hadley. It has endeavored to obtain a franchise in that town, and the town board has refused to grant the franchise. It may well be that it would be beneficial to the town of Hadley and the town of Luzerne if the Town of Hadley should grant the franchise to the Riddell corporation, and so avoid the perils of separate corporations so near together and each with an extremely limited market for its current. This fact the Commission can not control. The Town of Hadley can not be compelled to grant the franchise. In their wisdom or unwisdom its constituted authorities refuse so to do. The Riddell corporation, therefore, is without rights and has no standing in the case.

Mr. Riddell, who owns practically all the stock of the Riddell Electric Light and Power Corporation, is, however, a resident of the hamlet and town of Hadley and a taxpayer therein, and his objections present serious questions. He contends, first, that the franchise to the petitioner is void; and secondly, that the demand in Hadley is so slight that the enterprise can not be conducted with success and that the public will be thereby burdened.

The Hadley company is still in a way an inchoate corporation: that is to say, it is a paper organization with only five shares of stock issued for the purpose of organization. No issue has been authorized by the Commission. Its incorporators were five in number, each holding one share of stock, and all were members of the town board at the time of the incorporation. It is asserted that as members of the town board they had no power to grant a franchise to a corporation of which they were stockholders and directors. This principle can not be questioned. We find, however, that July 14, 1919, a meeting was held of the board of directors of the Hadley company at which the five directors, one by one, resigned. As each one resigned his successor was elected, until three new directors had been elected. The vacancies created by the resignation of the remaining two directors were not filled. Prior to or concurrently with the resigna-

tions, each director assigned his share of stock to the new directors. The new board then proceeded to direct that application be made to the town board for a franchise. The town board, consisting of the former directors and one other, the same day granted the franchise in question. It does not appear who was present at this meeting.

It is asserted in the first place that there was no lawful resignation by the original directors of the Hadley company because such resignations were not in writing. Our attention is not called to any provisions of law requiring such resignations to be in writing. The resignations were entered in the minutes, and this, with the transfer of the stock, undoubtedly removed them from office in the corporation.

There is parol evidence that the franchise, while granted the same day as the change in directors, was granted at a later hour. There can scarcely be doubt of this, because it is quite evident that the transfers of stock and resignation of directors were acts performed for the very purpose of evading the principle of law now invoked. This principle has been applied in this State to the extent of denying to a corporation payment of a bill of \$7.44 for electric lamps sold by the corporation to a county, because one of the supervisors was an officer of the corporation although he held only a qualifying share, took no part in the transaction, and apparently knew nothing of it. Even in that case, however, the court remarked, "Of course if a large sum of money were involved, so that a rejection of the bill would work great hardship and injury upon the relator, we might adhere to the principle and make an exception of this case in order to work out equity". (*People ex rel. Schenectady Ill. Co. v. The Board of Supervisors of the County of Schenectady*, 166 App. Div. 758.) Here the letter of the rule does not apply. At the time the franchise was granted no member of the town board was a stockholder or director in the corporation.

That the transactions of the board of directors of the cor-

poration and the town board were a preconceived scheme is unquestionable from the circumstances, and the evasion accomplished of the application of the strict letter of the law should not be permitted to shield the transaction if there can be any question of personal advantage to be derived therefrom by any of its participants or any tangible suspicion as to its good faith. So far as the record before us discloses neither of these elements appears. The predecessors of the present members of the town board and some, at least, of these members themselves had some years before, by their own error, involved the town in a lighting plant which the town had no right to construct or operate, and which, if not at that time standing idle, was being operated gratuitously and equally without authority by its purchaser at judicial sale. The inference is exceedingly strong that the object of these men was to salvage this plant and to put matters in shape so that it might lawfully be operated for the benefit of the hamlet. A dislike or distrust of Mr. Riddell may have moved them in their negotiations and acts, but they were under no legal or moral responsibility to let him construct a new plant in the hamlet, and Mr. Gatti was under no obligation to sell him the existing plant.

The circumstances invite a scrutiny of Mr. Gatti's connection with the matter. Mr. Gatti had purchased the mill property and had invested therein a very large sum, said in one place to amount to \$400,000. He testifies that he has under contemplation large expansions of the mill, that he expects to bring a considerable number of workers to Hadley to operate the mill, and that these workers will need houses and lights. He also testifies that he was advised by an expert who was on the stand and who corroborates him, that it was essential for him to retain complete control over the lighting system within the mill. For this reason he desires to retain ownership of the generating system at least, and is willing to undertake the lighting of the hamlet for the benefit of its inhabitants, largely his own workmen. He

proposes to transfer the lighting system, either complete or merely the distributing system, to the petitioner, and to accept in payment the petitioner's stock to an amount to be fixed by the Commission on a subsequent application. He was warned on the hearing that the market was so small that he could not hope the venture would be financially successful at rates which the community would be willing to pay. The matter is so small in comparison with his mill interests that he professes himself willing personally to stand the loss if any should occur. In all this we trace no indications of dishonesty on the part of the town board or of lack of good faith toward the community. As the letter of the law has not been infringed, the Commission does not feel that it should disregard the franchise in the absence of evidence of unconscionable conduct on the part of the participants in the transaction. It is possible that all the facts are not before the Commission, but a complete investigation, if one is desired, should be a judicial investigation in the form of a direct attack on the franchise.

The second objection does not raise so close a question. The hamlet of Hadley contains forty or forty-three residences and about two hundred and fifty inhabitants. Domestic consumption was not really tested under the short period of municipal operation. It is impossible to conjecture with any exactness the probable number of domestic consumers. The only exact factor is the contract for fifty street lights. The propriety of this contract, if it is open to review at all, is likewise a question for the courts. If the application were to construct a new electric plant in such a community, with a view to obtaining a return on the investment, the writer would vote "no," for reasons similar to those expressed *In the Matter of the Petition of the Village of Schenevus*, decided August 12, 1919. Nevertheless, in 1912, on the evidence then before it, the Commission, evidently in ignorance of the defects later held fatal by the supreme court, approved the construction of the plant. The plant was con-

structed, it is still in existence and ready for operation, and Mr. Gatti is willing to dispose of it for what he paid, which is much less than the original cost and apparently just sufficient to refund to the taxpayers such taxes as had been unlawfully imposed upon them. It is better to permit continued operation of the plant by one thoroughly familiar with financial possibilities and who would be, on his testimony in this case, estopped from demanding unduly high rates, than to deny the application with the probable consequent junking of the plant and the withholding of service from the community, unless the community and Mr. Gatti should change their minds and their apparent dispositions and make suitable arrangements for the conduct of the business by the Riddell corporation. A better state of feeling may yet lead to the consolidation of the two plants, and it is just as likely to occur with the Hadley plant operating as with it standing idle or partly junked. The petition should, therefore, be granted.

Chairman Hill and Commissioner Fennell concur, Commissioner Fennell in a memorandum; Commissioner Barhite dissents in a memorandum; Commissioner Kellogg takes no part.

FENNELL, *Commissioner*, concurring:

The petitioner was incorporated by five members of the town board of the Town of Hadley. Its purposes were, as stated in its certificate of incorporation, "manufacturing and selling electricity for the producing of light, heat or power, in lighting streets, avenues, public parks and places, and public and private buildings of cities, villages and towns within this State, as follows, to wit, town of Hadley, Saratoga county".

To carry out the above purposes, it would be necessary to have a franchise in the town of Hadley, Saratoga county. Thus it appears that the entity incorporated for the above purposes by the members of the town board became ineffec-

tive to operate even as it was created. Apparently a close legal question is presented as to whether or not the defect in the original incorporation lives on or is cured by the separation of the incorporators from the corporation. It would have been much simpler if the present owners of the petitioner had incorporated their own company and kept such questions out of the case. However, as the question is a legal one and outside the jurisdiction of this Commission, I am willing to agree that the petition be granted, leaving the contesting parties to exercise such legal rights as they deem best.

BAEHITE, *Commissioner*, dissenting:

In 1912 the town board of the Town of Hadley formed a lighting district, and a plant was constructed with town money, and put into operation. An action was started to prevent the town from proceeding with the venture. This action resulted in a permanent injunction restraining the town from operating the plant. As a result of a further action the plant was sold and the proceeds divided among the taxpayers. The plant was purchased by a gentleman who is the owner of an extensive business in the town. The members of the town board formed a corporation, known as the Hadley Light and Power Company, for the purpose of purchasing and operating the plant. In the words of the attorney for the company: "I was as a matter of fact in the Supreme Court case representing the Town of Hadley and we took the position that the Town of Hadley owned this plant because it was constructed with the money from the taxpayers" . . . "the members of the town board formed a corporation known as the Hadley Light and Power Company, signed a certificate of incorporation, ready, when we got the judgment, to incorporate, and turn the stock over to the town. Because the town could not run a lighting plant, we wanted to form this corporation, take legal proceedings to

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vest the title in this corporation and take back the stock for the benefit of the town " . . . " So that the first original members of the town board of Hadley never had any interest in that plant financially and haven't any interest in that plant today."

Each member of the town board subscribed for one share of stock to qualify him to act as a director. Later the directors resigned one by one and others were elected in their places. The new board immediately applied to the old board who were still members of the town board for a franchise which was promptly granted. Application is now made to this Commission for approval of this purchase and for permission to begin operations pursuant to its terms.

I agree thoroughly with the suggestion of Commissioner Irvine, that it would be much better for all parties concerned if the town of Hadley and the hamlet of Luzerne, directly across the Hudson river which at this point is only one hundred feet in width, were served by the same company, but that is a matter which rests entirely with the local authorities.

It is true that the interests involved in this application are comparatively small in amount, but the principle involved is one which should not be overlooked.

It is quite apparent that the action of the town board in organizing a company, in which, as counsel says, they had no personal interest, was for the purpose of evading the provisions of the judgment of the court against the town. It may have been an honest endeavor. I am not calling into question the motives of the town board, but only discussing the result of their acts, and it is a serious question whether the formation of this corporation and its purpose is not violation of the judgment of the court. When the members of the town board resigned and elected others in their places, it is quite evident that they understood that if they as town officials bargained with themselves as individuals, such act would be a serious violation of law and immediately to grant

a franchise to those whom but a few minutes before they had elected directors was on its face a violation of the spirit if not the words of the law. It can hardly be doubted that the corporation is still completely controlled by the town board.

Over these matters to which reference has been made this Commission has no control, but we are now asked to place the stamp of our approval upon transactions which are open to legal controversy. This should not be done. There should be no doubt as to the validity of transactions upon which the Commission acts. In the event of future litigation, which is likely to occur, it must not appear that the Commission had knowingly approved of events which are open to legal criticism. I advise against granting the application.

No. 477:107

Petition of THE CHAUTAUQUA TRACTION COMPANY under section 184, Railroad Law, for approval of a declaration of abandonment of a portion of its constructed route in a portion of the incorporated village of Westfield and to Barcelona, Chautauqua county. [Case No. 7264.]

A street surface railroad company has the right, pursuant to the provisions of section 184 of the Railroad Law, with the approval of the Public Service Commission, to abandon a portion of its road which it deems no longer necessary for the successful operation of its road and convenience of the public, notwithstanding such abandonment is made prior to the expiration of the term of the statutory consent of the local authorities by virtue of which the railroad was constructed.

Decided February 26, 1920.

Appearances:

Marion Fisher, Jamestown, for petitioner.

Lee Ottaway, Westfield, for the Village of Westfield.

James H. Prendergast, Westfield, for the Town of Westfield.

HILL, Chairman:

The applicant prays for the approval under section 184 of the Railroad Law, of the abandonment of 5332 feet of its road extending from First street in the hamlet of Barcelona, along Portage street, to a point opposite the New York Central depot in the village of Westfield. About one-half of the track is situate in the town of Westfield, outside of the village, and the remainder in the village of Westfield. The portion of the road in question is an outlying branch line from the applicant's general system, which latter is of considerable extent, the branch in question being of comparative insignificance. Barcelona is a hamlet on the shore of Lake Erie comprising about forty houses within a radius of one-half mile, with a population of about one hundred people, and along the highway occupied by the track between Barcelona and Westfield are twenty-three houses, mostly located just

north of the Lake Shore tracks in Westfield. The population of Westfield is approximately three thousand five hundred. The line was put in operation in 1909, a small street car being used in the service. It has always run at a heavy loss in operation, the loss reaching several thousands of dollars each year. The operating costs in 1917, including taxes and depreciation, were shown to be \$7789.52 against revenues of \$2157.85; and for 1918, when the smaller car was used, the corresponding cost was \$6108.92, with revenues of \$1368.25. This cost, however, included an unusually large item of \$807.50 for bridge repairs, and the power costs are perhaps overstated, being based upon the average cost of car-miles operated over the entire system, with no allowance for the smaller demand of the one-man operated Barcelona car. But, making all possible allowance for error in the company's favor, the fact remains that even with the one-man car the Barcelona branch shows a very heavy operating loss, leaving entirely out of view any consideration of return on investment. In 1919 the complete figures were not available, but it appears that up to December 6th the revenues were \$1559.59, while the actual platform expense was \$1456.51. The corresponding platform expense for 1917, with the larger car, was \$2942.12, and with the smaller car in 1918, \$1668.51.

The expectation seems to have been that Barcelona would develop as a residence and summer resort, but this hope never materialized, the trend in the volume of traffic having been downward rather than upward, and there has been no increase in either population or traffic. There are only two Barcelona residents who ride daily to business in Westfield, and only six students during school terms and these are apt to walk in good weather. The heaviest loads during the day consist of seven or eight passengers. The highway is good, and autos are used extensively by the residents of both Barcelona and Westfield. The usual schedule is a half-hourly one and the fare is five cents. There is thus a clear case for abandonment, unless it could be made to appear that for

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particular reasons the operation of this branch could reasonably be continued at a loss which should be absorbed by the general system. In 1918 increased rates were allowed by the Commission and are now in effect but without satisfactory results. The railroad as a whole is highly unprofitable, and it is absolutely necessary that all leaks must be stopped if the property is to survive. The greatest proportionate loss is on the Barcelona branch.

Naturally, abandonment is opposed by those persons who patronize the branch and to whom, we must infer, it is a very great convenience. The facts, however, are not disputed. The board of directors has declared, in accordance with the provisions of the statute, that the branch is no longer necessary for the successful operation of its road and the convenience of the public. Objection was also made that the abandonment will have the effect of eliminating the operation of the Barcelona car on about one-half mile of track in the village which is not being abandoned but which was included in the route of the car. This service is for the most part given by other cars, but the service will be less frequent. It did not appear, however, that this portion of the service had been considerable, and what there was of it was included in the earnings of the car as given above. Of course, every railroad which is patronized at all is a great convenience to those who make use of it; but public convenience can not be predicated upon a use which constantly falls far short of affording reasonable financial support. In this case a fair trial has been given the enterprise, with no result but heavy financial loss and no prospect of improvement in the future.

The objection is raised, however, that because of certain provisions in the statutory consents of the local authorities by virtue of which the branch was constructed, the railroad company has no legal right to make the proposed abandonment under section 184, and that said section, so far as it assumes to extend that power to the company, is unconstitutional.

It seems that the various statutory consents of the local authorities of the Village of Westfield contain a provision that "said The Chautauqua Traction Company shall provide some system by which it will carry passengers from any part of the village of Westfield on its road to Barcelona and return for not exceeding ten cents," and the consent of the local authorities of the Town of Westfield contains a condition that the company "shall carry persons entering its cars at First street in the hamlet of Barcelona or south thereof to the south corporation line of the village of Westfield for five cents, and at the same rate within said points in the opposite direction"; and also a condition that it "shall provide some system by which any resident of said town regularly attending the public schools of the village of Westfield may buy . . . a book of tickets . . . at the rate of twenty tickets for sixty-five cents, giving the right to ride on the road of said company between First street in the hamlet of Barcelona and Main street in the village of Westfield". All of the consents were for a period of ninety-nine years. Said last named consent also contained the condition that in case of failure of the company to comply with or perform any of the conditions upon which this consent is granted, the same shall be forfeited and all rights thereunder shall immediately cease and determine.

The position is taken by the village and the town that the consents in question are binding contracts, made pursuant to power reserved in the local authorities by constitutional provisions, and that the conditions of such consents can not be affected by legislation; that hence the provisions of section 184 of the Railroad Law, which assume to clothe the company with power, by means of an abandonment, to infringe the above quoted conditions of the consents, are unconstitutional. Without undertaking a discussion at length of the authorities so fully quoted in the briefs, I think it is important to consider, first, that section 184 of the Railroad Law was in effect at the time of the granting of the consents in question; and second, that those conditions of the consents

which refer particularly to the Barcelona branch all apparently had as their design the fixing of the rates of fare to Barcelona rather than the making of a condition which should require the operation of cars to that point.

Counsel for the objectors insist, however, that even so, the local consents or franchises, being for a defined term, constitute at least an implied agreement on the part of the railroad company to operate its entire road for the full length of the term; that such condition having been imposed pursuant to power vested in the local authorities by the constitution, it was beyond the power of the Legislature, by the adoption of section 184, to empower the company to avoid the obligation thus assumed; and the *Quinby* case is referred to as authority for the proposition so advanced. I do not thus construe the *Quinby* case. The extent of that decision seems to have been that, whether or not the Legislature possesses the power to regulate rates of fare which have been fixed by local authorities as conditions of their statutory consents, it has not by the provisions of the Public Service Commissions Law delegated such power to the Commission. That question does not arise here, because the right to approve here invoked has been expressly so delegated by the provisions of section 184 of the Railroad Law.

In matter of *International Railway Company v. P. S. Comm.*, 226 N. Y. 474, the court, dealing with the subject of conditions imposed by municipalities in consents of this character, says: "No contract can withdraw from the Legislature the power of regulation while the consent of the municipality to the presence of the road continues. That is settled beyond doubt." [Citing *Matter of Quinby* and other cases]. And the court, dealing with the subject of the condition subsequent annexed to the consent, further said: "The Legislature may say that subject to the condition subsequent annexed to the consent of the locality, there shall be a change of the motive power or an increase of the rates. It may say that if the local authorities do not promptly manifest the election to revoke, the condition will be waived. The doubt

is whether going further it may wipe out the condition altogether and transform a consent that was qualified into one that is absolute. In deciding the *Quinby* case, we left that question open, as we leave it open now." And further elucidating the doctrine of the *Quinby* case, the court continued: "We found a limitation of the rate of carriage lawfully imposed by a municipality as one of the conditions of its consent. We found nothing in the statute expressly authorizing its annulment. . . . In default of clear and definite language, we followed the settled rule that a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

In section 184 we find the clear and definite language which was lacking in the *Quinby* case. We conclude that the objection of unconstitutionality is not sustained, and that the prayer of the petition should be granted.

All concur.

In the Matter of the Complaint of ISAAC S. HELLER AND OTHERS *against* NEW YORK TELEPHONE COMPANY as to toll rate between Woodmere, L. I., and the boroughs of Manhattan or Brooklyn, New York city. [Case No. 7040.]

Decided March 4, 1920.

Appearances:

Isaac S. Heller, 27 William street, New York city, a complainant, in person and as attorney for other complainants.

Clarence J. Galston, 49 Wall street, New York city, individually and as attorney for Woodmere Improvement Association and others interested.

Robert C. Birkhahn, 5 Nassau street, New York city, individually and as attorney for others interested.

F. N. Shepard, Hewlett, Nassau county, in person.

Paul H. Burns, 15 Dey street, New York city, as attorney for New York Telephone Company, respondent.

HILL, Chairman:

This is a complaint by a resident of the village of Woodmere, Long Island, who is a patron of the New York Telephone Company, against the toll charge of fifteen cents between Woodmere and the city of New York, boroughs of Brooklyn or Manhattan.

The ground of the complaint is not that the rate is of itself, considering the distance, excessive, but that it is discriminatory as compared with the five cent rate charged for the same toll service to the adjoining communities of Far Rockaway, Cedarhurst, Lawrence, and Inwood. The fact is stated to be that the relative distances are substantially the same, and that therefore there is no sound reason for the large difference in the rate.

The apparent discrimination thus complained of grows out of an adjustment of the territory in question which was made

by the Commission by virtue of its order of December 16, 1912 [case No. 2971], on a complaint of residents of Inwood and other points, as a result of which the free exchange territory of what were described as the Far Rockaway exchange and the Woodmere exchange were readjusted, and what is now known as the Woodmere exchange was substituted for the then Cedarhurst exchange. Inwood, Lawrence, and Cedarhurst were thus thrown into the Far Rockaway exchange, and thereby automatically received the benefit of a then existing fifteen cent toll rate between the Far Rockaway exchange area and New York. The Far Rockaway central office is within the boundaries of the city of New York, and the toll rate from points within the area of that exchange to the city of New York has thus since followed the toll rates applicable to points within the city of New York. The result is that at present, by virtue of an adjustment of the rates in the city of New York, the subscribers' toll rate has been reduced to five cents.

On the other hand, the subscribers' toll rate from the Woodmere exchange falls into the category of exchanges lying outside of and contiguous to the boundaries of the city of New York, in what might be called the first zone outside of said city, and thus came to be fixed at twenty cents, since reduced to fifteen cents.

In the order of December 16, 1912, above referred to, this apparent discrimination received the attention of the Commission. The toll rate from Woodmere was then twenty cents, and the order recited that "The present twenty cent rate between the so called Woodmere exchange territory and Manhattan remains in effect. As to such charge the Commission expresses no opinion at this time. The discontinuance of mileage charges in that new exchange area [meaning the readjusted Woodmere exchange territory] will result in considerable reductions to a great many of the subscribers there located, even with a twenty cent rate to Manhattan. Whether a fifteen cent rate to and from Manhattan for the

Woodmere exchange subscribers, which include those at Hewlett, should be made effective, is a matter not passed upon in any respect in this proceeding."

It is quite clear, therefore, that the apparent discrimination arises, not because the Woodmere rate is unreasonable in itself, but from the fact that Inwood, Cedarhurst, and Lawrence, although lying just outside the boundaries of the city of New York, still being included in the Far Rockaway exchange area, get the benefit of the fact that the Far Rockaway central office is within the city of New York, and it thus happens that by reason of the formula applied by the telephone company uniformly throughout the State of New York in the making of toll rates, these three communities obtain the advantage of being included in the Far Rockaway area and thus enjoying the toll rate applying thereto. On the other hand, if we should use this fact as a reason for readjusting the toll rates from the Woodmere exchange area to New York, it would follow that the toll rates from all other exchange areas in the first zone equidistant from New York would have to be reconsidered on the same ground.

We assume that the complainant and those in sympathy with him are not particularly anxious to deprive certain of their neighbors of an advantage which they seem fortunate enough to have secured through a mechanical application of a general formula, at least unless such deprivation would result to the advantage of the Woodmere area. Obviously, if there does exist a discrimination which calls for correction, the remedy is to be found, not by decreasing the Woodmere rate but by eliminating the advantage which this narrow strip of territory, including Inwood, Cedarhurst, and Lawrence, seems to be enjoying. The application of this remedy, if on consideration it should be found proper, would not, however, inure to the benefit of the complainants. It would in the abstract vindicate the principle of equality of treatment, although from a practical standpoint the telephone company alone would receive any financial advantage.

It would seem that the only course for the Commission to pursue is to dismiss this complaint and consider any needed revision of the toll rate to the city of New York from Inwood, Lawrence, and Cedarhurst in connection with the subject of New York interzone toll rates when and as that subject may hereafter come before it for disposition. The period of the continuation of the present New York rates expires during the current calendar year, and no doubt the entire subject will come before the Commission at an early date.

Opinion presented by Chairman Hill was concurred in by Commissioners Irvine, Barhite, and Fennell; Commissioner Barhite stating that in his opinion the matter of the zone rates referred to should be taken up before October 1st; and Commissioner Fennell stating that he does not agree that the determination of the question raised in this case should be postponed until October 1st. Commissioner Kellogg dissented from the Chairman's opinion and filed an opinion.

KELLOGG, *Commissioner*, dissenting:

By order of this Commission entered September 16, 1919, the telephone toll rate between the various zones in the city of New York was limited to a maximum of five cents. This rate fixed by order of this Commission must be deemed to be reasonable.

The most southeasterly exchange in the city of New York is the Far Rockaway exchange, in the borough of Queens. It is near the city line. By an order made by this Commission December 16, 1912, in case No. 2971, the adjacent villages of Cedarhurst, Lawrence, and Inwood, in the county of Nassau, are served by this exchange, and are thus enjoying a toll rate to other zones in the city of New York of five cents, to the same effect as if they were actually within Queens borough.

The next exchange to the east is that of Woodmere. Under the present tariff subscribers served by it pay a fifteen cent toll to the boroughs of Manhattan and Brooklyn, as distinguished from the five cent toll paid in the Far Rockaway exchange area.

This very marked distinction, whereby the cost is trebled with substantially no increase of distance for the same service, is an unreasonable disadvantage to the complaining locality of Woodmere, under subdivision 3 of section 91 of the Public Service Commissions Law, which reads as follows:

No telegraph corporation or telephone corporation shall make or give any undue or unreasonable preference or advantage to any person, corporation or locality, or subject any particular person, corporation or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

It is quite true that increases of distance warrant increased charges, and that zones must be created whose distinct boundaries mark a line of increase from the lesser to the greater charge. It is also true that this necessarily works to some disadvantage to those close to the boundary, who being beyond it must pay a greater rate than their more fortunate near neighbor the other side of the line.

The city line forms a natural line of limitation of zone, and the inclusion of the villages of Lawrence, Inwood, and Cedarhurst within the privileges enjoyed by the actual inhabitants of the city does not affect the questions now before us. They may or they may not be entitled in fairness to the same rate as the residents of Far Rockaway served by the same exchange. However that may be, or wherever a zonal boundary is drawn, there should not be an increase from five to fifteen cents, at least in a situation such as is experienced at Woodmere, where the villages are contiguous and are separated only by imaginary lines.

Some increase in charge would seem to be proper and natural, and five cents additional added at each zone line could not properly be complained of, but the increase to fif-

teen cents seems to be too abrupt, and is an unjust discrimination against the locality which the statute sought to prevent. Of course this principle extended would require the inclusion of other localities similarly situated, if such there be, in a ten cent zone adjacent to the city of New York immediately surrounding the five cent zone.

No. 479 : 119

In the Matter of the Complaint of HORATIO G. GLEN of the city of Schenectady *against* MOHAWK EDISON COMPANY, INC., as to practice in respect to electric wires in buildings being inclosed in metal pipes, and the placing of electric meters. [Case No. 7067.]

An electric lighting company has no legal right arbitrarily to prescribe the location in a building which must be provided by the owner for the installation of the meter.

So long as the equipment is safe and sufficient, and a place which is safe and reasonably accessible is provided for the meter installation, the owner is entitled to service, if the statutory requirements as to other matters have been complied with.

A regulation that wires from the service to the meter must run in conduits promotes safety, and therefore is reasonable and should be complied with.

Decided March 9, 1920.

Appearances:

Horatio G. Glen, Schenectady, the complainant, in person.

D. E. Peck, Law Department General Electric Company, Schenectady, for respondent.

KELLOGG, Commissioner:

In this proceeding the complainant, in behalf of himself and other property owners in the city of Schenectady, criticises certain regulations adopted and practices followed by the respondent in regard to the location of meters and placing of wires in iron conduits.

By regulations of the company adopted September 1, 1915, and renewed March 1, 1919, it assumes to prescribe certain requirements as to the place in which meters should be located in buildings, and as to the protection of wires by inclosing same in iron conduits. The regulations require, with certain exceptions, the installation of meters in cellars. They also require that "All wires from the service to the meter must be run in exposed iron conduits not smaller than three-fourths inch".

By requiring the installation of the meter in the cellar, and the placing of the wires in iron conduits from the point where they attach to the upper part of the building, running thence down along the side of the building and into the cellar to the meter, the cost of construction is somewhat, although not materially, increased, and the presence of the conduit on the outside of the building is claimed to be unsightly.

In instances where a tenant has moved out of a building, and the meter which was placed to the upper stories of the building has been removed, the company has sometimes insisted on having the wiring in the house rearranged so that the meter may be placed in the cellar before rendering service to a subsequent tenant. This, together with the construction of the conduit to protect the wires, has entailed upon the landowner an expense which is said to be unreasonable and unnecessary.

The issues joined upon this complaint and answer are placed directly within the jurisdiction of this Commission by subdivision 5 of section 66 of the Public Service Commissions Law, which provides, among other things, in reference to gas corporations and electrical corporations, that "Whenever the Commission shall be of opinion . . . that . . . the acts or regulations of any such . . . corporation . . . are unjust, unreasonable . . . or in anywise in violation of any provision of law, the Commission shall determine and prescribe . . . the just and reasonable acts and regulations to be done and observed".

The problem involved requires for its solution the examination and determination of the rights respectively of the lighting corporation and the prospective consumer.

By article 7 of the Transportation Corporations Law certain valuable rights are given to this class of corporations in reference to various matters, including valuable privileges as to the occupancy of public streets and public places, with the consent of the municipal authorities. In view of these valuable and necessary rights granted to such corporations,

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certain duties are imposed upon them for the benefit of the public.

By section 62 a very imperative and unquestionable duty is imposed upon electric light corporations, in reference to furnishing of electricity to the owner or occupant of any building or premises within one hundred feet of its wires. This duty is imposed notwithstanding there may be unpaid bills due from a previous tenant, and an onerous penalty is prescribed for the neglect to furnish electric light for ten days after demand therefor. This penalty is fixed at the sum of ten dollars, plus five dollars for each additional day of delay after the first ten days.

This severe penalty has been strictly applied by the courts, notably of late in the Court of Appeals in the case of *Tismer v. New York Edison Company*, decided February 24, 1920, in which a judgment against the company for three years of penalties, the full period of the statute of limitations, was sustained. In that case the company insisted that the prospective customer should furnish a certificate of approval of the Board of Underwriters, which board required the payment of a fee of two dollars and fifty cents before issuing the certificate, which small amount the prospective customer refused to pay.

This duty of furnishing electric light, imposed upon corporations formed for that purpose, is accompanied with the privilege on the part of the company of going at all times into a building where such light is being furnished, for the purpose of examining meters, fixtures, and other fittings, and a preliminary deposit can be demanded to secure payment for the current furnished; and upon refusal or neglect at any time to pay for the service, the company may enter upon the premises and remove the meter.

The duty to serve the public, recognized by the penalty prescribed by the statute, results not alone from this statute, but arises from the acceptance of the franchise by a corporation. (*People ex rel. Cayuga Power Corporation v. Public*

Service Commission, 226 N. Y. 527, and cases cited on p. 532.)

The only restriction upon this right to demand and receive electric light from such a lighting corporation, growing out of the nature of the transaction, is the right of the company to insist upon the sufficiency and safety of the equipment of the applicant. This right of the company, following a decision in regard to a similar right of a gas company, as determined in the Court of Appeals in *Schmeer v. Gas Light Co.*, 147 N. Y. 529, has been recognized by the courts. (See *Tismer* case, *supra*.)

In a case decided by the First District Commission, December 24, 1918, a question as to the right of an electric corporation to prescribe conditions additional to those of the statute was discussed at length by Chairman Hubbell. After reviewing the various safeguards provided by the law itself, he proceeds as follows:

"It would thus seem that the Legislature itself has undertaken to regulate and prescribe in great detail the conditions precedent to the right of a person to receive electric service and the obligation of the utility to furnish service. These conditions can not be increased by the utility, any more than they can be diminished by the consumer, and when a consumer has complied with the statutory regulations he becomes entitled to have service furnished to him, the only recognized qualifications being that the company may make reasonable rules and regulations as to the sufficiency and safety of the equipment of the person applying for gas and electricity. (Citing *Tismer v. New York Edison Co.*, 170 App. Div. 647.) Once a consumer has complied with the prerequisites of the statute, he may not lawfully be denied service by the company. (Citing *People ex rel. Perceval v. Public Service Commission*, 163 App. Div. 705.)"

There may be, however, a further qualification of this absolute right of the prospective customer to demand electric lighting service inherent in the nature of the contract, and that is that the meter must be so placed as readily to be accessible without danger to an employee of the company desiring to read or inspect the same. But beyond this the company can not go under the provisions of law. It has no right to dictate as to the place in his building where a land-

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owner shall provide for the installation of a meter except to the limited extent above indicated. This would seem to be, under the authorities referred to, a matter upon which the individual landowner may exercise his taste and judgment, and as to which the company can not interfere so long as the meter is not placed in a dangerous or inaccessible position.

It would seem, therefore, that the requirements that the meter should be placed in cellars in the city of Schenectady is beyond the power of the company to demand or enforce, and that an insistence upon such a requirement would render the company liable, under the statute, to the penalty prescribed, if the prospective customer provides a place which is safe and reasonably accessible.

As to the requirement for the installation of the wires from the service to the meter in an iron conduit, another question arises. The evidence indicates that unprotected wires are dangerous. This danger may be avoided by the installation required. Therefore, this regulation is entirely within the power of the company, and should be respected and enforced.

If the foregoing is correct, an order should be entered herein determining and prescribing that the requirements that the meter shall be installed in the cellar, or any other arbitrarily designated place in a building, is unjust and unreasonable, and in violation of law; that a regulation providing for the installation of meters at any place within a building which is safe and reasonably accessible, shall be deemed to be adequate; and that a regulation that all wires from the service to the meter must run in iron conduits is just and reasonable.

All concur.

Petition of ANTONI LICEWICZ, also known as Anthony Lynch, under chapter 667, laws of 1915, for a certificate of public convenience and necessity for the operation of a stage route by auto buses in the cities of White Plains and New Rochelle, it being proposed that the route shall also be operated between said cities. [Case No. 7307.]

Decided March 9, 1920.

Appearances:

Eben H. P. Squire, 21 Grand street, White Plains, as attorney for applicant, Antoni Licewicz, also known as Anthony Lynch, who also appears in person.

Addison Scoville, 2396 Third avenue, New York city, as attorney for The Westchester Electric Railroad Company.

L. S. Miller, 105 West 53rd street, New York city, for New York, Westchester and Boston Railway Company.

Eugene F. McKinley, City Realty Building, White Plains, as attorney for The Westchester Street Railroad Company and New York and Stamford Railway Company.

FENNELL, Commissioner:

Antoni Licewicz, also known as Anthony Lynch, a resident of White Plains, desires to conduct an auto bus route from the business center of White Plains to the business center of New Rochelle, a distance of about ten miles. He has received municipal consents for such purpose from both cities. The portion of the city of White Plains through which it is proposed to operate the auto bus line is now served by the street railroad of The Westchester Street Railroad Company. The territory in the town of Mamaroneck and the city of New Rochelle through which it is proposed to operate the auto bus line is now served by the street railroads of the New York and Stamford Railway Company and The Westchester Electric Railroad Company.

The proposed auto bus line competes with the trolley lines between the termini in the two cities, and substantially parallels them for about four and one-half miles, or nearly one-half of the total distance.

It was testified by the president of The Westchester Street Railroad Company that the zone from White Plains to the south line of Scarsdale produced an operating deficit for the month of November, 1919, stated to be an average month, of \$188.61, including neither taxes nor interest; that the capital allocated to this zone would be about \$160,000. He also testified that the operation of the Mamaroneck line from White Plains to Chatsworth avenue, Larchmont, for eleven months ended November 30, 1919, shows an operating loss of \$34,657.67, including neither taxes nor interest.

It appears from an exhibit filed that The Westchester Electric Railroad Company had an operating income after payment of taxes for the six months ended December 31, 1919, of \$6551.89, with interest deduction of \$57,060.84, leaving a deficit of \$50,508.95 for the six months.

The applicant testified that he contemplated investing \$5000 in two auto buses; that he expected receipts of \$50 a day; that his schedule called for one trip each way each hour for fourteen hours a day. Assuming a mileage cost of twenty cents, his daily cost would be \$56; at twelve cents a mile, it would be \$33.60. If he were granted all he asks his project does not look very profitable. He also testified that an operation between the city line of White Plains and the city line of New Rochelle would not be profitable.

The granting of a certificate of convenience and necessity, with the usual limitations upon the carriage of passengers between competing points and upon parallel portions of routes, would not warrant the proposed ten mile operation.

Objections were made at the hearing that preliminary steps taken by petitioner were insufficient, and that there were fatal defects in the proceedings taken prior to this application and upon which it is founded. The disposition

of the case upon the merits makes unnecessary a discussion or determination of the questions raised by the objectors.

It would seem that public convenience and necessity do not require the operation of said auto bus line.

An order has been made accordingly.

All concur.

No. 481:127

Petition of AUBURN AND SYRACUSE ELECTRIC RAILROAD COMPANY under subdivision 1, section 49, Public Service Commissions Law, for permission to increase passenger fares. [Case No. 6074.]

1. An electric railroad corporation operates a city system and an interurban line entering the city over the tracks of the city system. On the interurban line freight service is afforded. In an inquiry as to a reasonable rate for urban passenger service no portion of the freight revenues should be credited to the city operations, but the interurban line should be charged for the maintenance of way and power used by the freight cars. These charges should be apportioned on the basis of weighted cars.

2. General and miscellaneous expenses of the city system which can not be allocated should be apportioned on the ratio borne by allocable city expenses to the entire expenses of the system.

3. The Auburn and Syracuse Electric Railroad Company authorized to charge an urban rate of seven cents for passenger transportation upon its system in the city of Auburn.

Decided March 9, 1920.

Appearances:

Nottingham, Nottingham & Edgcomb (by Ernest I. Edgcomb), 530-541 Onondaga County Savings Bank Building, Syracuse, attorneys for applicant.

William J. Harvie, Auburn, General Manager of applicant.

William S. Elder, Corporation Counsel, for City of Auburn.

J. P. Jaeckel, City Manager of Auburn.

IRVINE, Commissioner:

This case, presented first in 1917, sought an increase in rates within the city of Auburn and within the city of Syracuse from five cents to six cents. December 31, 1918, the increase was permitted in the city of Auburn and immediately adjoining territory. (*Petition of Auburn and Syracuse Electric Railroad Company*, 7 P. S. C. Reports, 2nd

District, 371.) The petitioner now asks further increase within the same territory to seven cents. The operations within the city of Auburn are conducted under various franchises granted to the applicant and its predecessors, some of which at least contain provisions restricting the fare to be charged within the territory herein involved to five cents. This restriction was in 1918 waived so as to permit the Commission, after investigation and if found necessary, to authorize a rate of six cents. The City of Auburn, on January 13, 1920, further waived such restriction, under certain conditions, so as to permit a further investigation and a fare not to exceed seven cents within the same limits.

The Auburn and Syracuse Electric Railroad Company operates the city system within the city of Auburn. Its so called city lines are entirely within the city except for two extensions, each leading some distance outside the city limits to the southward to a point at the foot of Owasco Lake, and one line leading out an extension of Franklin street eastwardly from the city to Soule Cemetery. The company also operates an interurban line from the center of Auburn into the city of Syracuse, entering the city of Syracuse over tracks of the New York State Railways. The interurban cars enter and leave the city of Auburn by means of the Franklin Street line. Local city cars furnish service by the two roads to Owasco Lake. There is also local car service on the Franklin Street line to a point near the eastern city limits where the company maintains car-houses. From this point eastwardly to and from Soule Cemetery the local service is performed by the interurban cars. The sole difficulty in examining the financial results of the city operation is in making a proper apportionment of the expenses between the interurban line and the city system. It is true that the Owasco Lake lines present some features of extra-city operation, but they are operated as a part of the city system by local cars and the traffic is essentially urban in character. There is no reason why these lines and their operation should not be considered an integral part of the city system. On

the interurban line the tariffs are so constructed as to yield a city fare between all points from Soule Cemetery to the Auburn terminus, with transfer privileges as upon other city lines. In the revenues presented there is therefore credited to the city operation a city fare for every interurban passenger carried on interurban cars into or out from the city. It is, therefore, proper to consider the interurban line as far as Soule Cemetery as a part of the city system both as to revenues and expenses. The evidence was presented on behalf of the applicant upon the same theory as in the application of December, 1918. This method was then accepted by the Commission as fair for the purpose in view, but Commissioner Cheney added, "If any errors of judgment have been made in this apportionment they have been such as tend to increase the apparent net revenue of the city lines". The case then seemed so urgent that the Commission thus accepted the showing after it had been found on examination to work no possible injustice to the city. Inasmuch as the city rates may very likely again be called in question and there may arise controversies over interurban rates, it is now felt that in this examination an effort should be made to establish a basis of accounting which can be observed in future cases where different interests might be presented for consideration.

In addition to the passenger business, the company operates freight cars between Auburn and Syracuse. In the former case, the city operation was credited with a proportion of the freight revenue. This was ascertained on a mileage basis. The freight line is twenty-seven miles in length, and three miles is west of Soule Cemetery. The city, therefore, was credited with one-ninth of the freight revenue, and expenses were apportioned as in the case of passenger operation. The freight business is exclusively interurban. We are here dealing solely with urban passenger rates. To apportion freight revenues to city operations would lead to their reduction from interurban revenue should a question as to the latter arise. We think a better method is to exclude

altogether freight revenues from the calculations, to charge against the interurban operations a proper proportion of maintenance of way and structures and power, and to deduct altogether from the city operating expenses this proportion and the wages of freight motormen and conductors. This has been done. The apportionment of maintenance of way and power is based on the weighted car basis, that is to say, by using the proportion that the product of the weight of the freight cars multiplied by the distance traveled bears to the weight of all cars multiplied by the distance traveled. This ought to afford an approximately exact apportionment of the two items. This correction, while necessary for the purposes above stated, is not sufficient in amount to affect the determination of the case now before us.

Another adjustment of more serious practical consequence is that of apportioning general and miscellaneous expenses. The company charged to the city operation a sum based upon the proportion that the city revenues bear to the entire revenues. This method is one not infrequently used, but as related to operating expenses it is clearly defective as involving the assumption that expenses are necessarily apportioned to revenues. If this were true there could be no basis whatsoever for fixing rates, because whatever they might be the expenses would rise or fall with the increase or reduction of the revenue. There is no method very satisfactory of apportioning such general expenses, but on the whole a more nearly accurate result can be attained by assuming that the general and miscellaneous expenses are proportioned to the allocable expenses. This method has been pursued, with the result of charging against the city operation for the year 1919 about \$9000 more than appears in the company's exhibits.

In other respects than those above mentioned the method adopted in 1918 has been pursued. Direct allocations are made wherever practicable, and where apportionments have been necessary they are based upon generally accepted methods set forth at length in the evidence of the auditor

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of the company. To repeat them here would require unnecessary detail. So adjusted, we obtain the following income account for the city system as hereinabove defined for the year 1918, when the five cents fare was in effect for nearly the entire year, and for 1919 when the six cents fare was in effect.

AUBURN AND SYRACUSE ELECTRIC RAILROAD COMPANY

Statement of Income, Increased Fare Zone (revised from company's exhibits)

Item	12 months ended December 31	
	1918	1919
Earnings:	<i>Dollars</i>	<i>Dollars</i>
Revenue from transportation:		
Passenger revenue	218,507.93	259,895.80
Chartered car revenue	69.00	162.31
Total	218,576.93	260,058.11
Other street railroad revenue:		
Advertising and other privileges	989.40	1,760.15
Rent from tracks and facilities	6,020.82	6,057.87
Rent from buildings and other property	392.80	472.36
Park and resort revenue	4,475.00	.....
Total	11,878.02	8,290.38
Gross earnings from operation	230,454.95	268,348.49
Operating expenses:		
Maintenance of way and structures	41,129.39	38,631.47
Maintenance of equipment	29,399.64	31,321.39
Conducting transportation	146,206.57	155,335.68
Traffic	6,668.58	1,571.39
General and miscellaneous	30,160.00	43,418.00
Total	253,564.18	270,277.93
Net earnings from railroad operation	*23,109.23	*1,929.44
Less taxes accrued	10,917.29	9,669.03
Income less operating expenses and taxes	*34,026.52	*11,598.47
Non-operating revenue:		
Interest revenue	3,682.98	3,859.43
Miscellaneous	1,052.85	806.86
Total	4,735.83	4,666.29
Gross income	*29,290.69	*6,932.16
Deductions from income, except interest:		
Track and terminal privileges	4,800.00	.....
Subway rental	1,718.76	.....
Total	6,518.76	.....
Income applicable to capital investment	*35,809.45	*6,932.16

*Deficit.

This shows a deficit from railroad operation under the six cents fare of \$1929.44, a deficit after paying taxes of

\$11,598.47, and of income applicable to capital investment of \$6932.16. Interest on bonds is not deducted. On the face of this showing no inquiry into the value of the property is necessary. The city system is of very considerable extent and the equipment seems adequate and in good condition. It is certainly entitled to earn some return and more than can be hoped under present conditions even from the proposed increase in fare. Furthermore, the evidence shows that the platform men are receiving lower wages than those generally prevailing on similar systems. They seek an increase, and the company believes that the increase is proper and should be allowed if the company has the means to allow it. This will further increase expenses. The result is very clear, and the application must be granted.

Under the terms of the city's waiver the franchise restrictions are waived for a period of three years. It is also provided in effect that the city may at any time within that period apply to the Commission for a reduction in rates. With this right reserved to the city, the order should be that the new rate be permitted for a period of three years from the date of the order, unless before that time it should be voluntarily reduced by the company or should be changed by order of the Commission.

In conclusion, it may not be amiss to repeat an admonition given already to some other companies under similar conditions, that is, that as there seems now to be no prospect of early return to conditions formerly considered normal in finance and prices, the best efforts of the company should be given to devising means of reducing expenses without impairment of service. Not that the Commission deems the present expenses excessive as compared with other systems operating under present methods; they are not so; but because it is felt that some improvements in the methods themselves are imperatively necessary.

All concur.

No. 482 : 133

Petition of THE NEW YORK CENTRAL RAILROAD COMPANY under section 91, Railroad Law, for an order determining that alterations or changes shall be made in the bridge structure carrying Bridge street, in the incorporated village of St. Johnsville, Montgomery county, over said company's railroad, main line. [Case No. 7309.]

Conditions at St. Johnsville overhead railroad crossing considered, and application for an order directing changes in structure denied, no present necessity for such changes being shown.

Decided March 9, 1920.

Appearances:

George H. Walker as attorney for applicant.

William J. Crangle as attorney for the Village of St. Johnsville.

KELLOGG, Commissioner:

Pursuant to an order made by the Board of Railroad Commissioners in 1900, in case G. C. 15, the grade crossing of Bridge street, in St. Johnsville, over the tracks of the New York Central railroad, was eliminated, and an overhead crossing established.

The bridge carrying the highway over the railroad tracks as constructed at that time can sustain a load of seven tons, with a factor of safety of between $3\frac{1}{2}$ and 4, and two trucks of that weight can pass each other on the bridge in security.

Corrosion to some extent has occurred in some of the members of the structure. The bridge in question is adjacent to the St. Johnsville freight house, and crosses, in addition to the four main tracks of the railroad, five additional tracks used for switching and storage purposes at that point. The frequent movement of trains and the starting of locomotives under the bridge, causing the escape of an unusual amount of engine gases, is said to have been the cause of this corrosion.

Repairs are necessary upon the superstructure, as is conceded by the railroad, the expense of which must be borne by it under the law, the cost of which will amount, as is estimated, to \$13,000. It desires not to expend this sum if the structure must in the near future be replaced.

The village of St. Johnsville lies entirely to the north of this bridge structure. The highway crossing it leads from the approaches to this bridge southerly directly to the bridge crossing the Mohawk river, where it forks into unimproved highways running east and west. Southerly of the railroad, between it and the river, stands the passenger station of the New York Central, and the manufacturing works of the Clark Machine Company.

The main line of through travel east and west is on the north side of the Mohawk, where there is the improved state road constituting a part of the main highway from Albany to Utica. There is no travel over this bridge except locally. The farmers use it, bringing in their milk and products and taking out their supplies, and the Clark Machine Company uses it for transportation to and from its works. For this latter traffic automobile trucks are employed, but they do not aggregate more than seven tons in weight, including both truck and load, to sustain which the bridge has ample strength.

The theory of this application is that due to the construction of the Barge Canal terminal, heavy additional loads will be carried. This event is too problematical to warrant the expenditure of state moneys, in view of the present condition of the appropriation. The terminal has not yet been improved, and it may be years before machinery is installed to care adequately for carrying heavy loads. In any event, the occasion will seldom exist where any heavier loads will be carried, and two seven ton trucks can now pass over the bridge with safety. There will be no frequent use, if any, of the bridge by heavier vehicles. There are no heavier trucks in the neighborhood, and there is no indication that

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there will be within any reasonable time in the future. If such use of the bridge becomes in any degree probable, the matter can again be brought to the attention of this Commission. Such a problem does not now exist.

The under-clearance of this structure varies from twenty feet four inches over the two main passenger tracks, to twenty-one feet over some of the switching tracks. It would be better if this clearance were greater. It appears, however, from a report made by the engineer of grade crossings, Mr. Sutermeister, on April 24, 1900, that the bridge then had an under-clearance of twenty-one feet. This was the usual under-clearance required at that time, and many bridges were constructed on that theory. This decrease is probably due to the gradual raising of the tracks by the railroad's employees while maintaining the roadbed, and is, as has been noted, greatest at the passenger tracks, which require the most attention in that respect.

The gradual but steady increase in the height of freight cars, the present maximum being substantially fifteen feet, makes it desirable to provide an under-clearance of twenty-two feet where possible in new work, but to raise all the bridges where the under-clearance is less than twenty-two feet would require an expenditure on the part of the State far in excess of any appropriations which may reasonably be expected for some time to come. It would also necessarily delay or postpone indefinitely many grade crossing elimination projects where the safety of the public is more vitally affected. The fact that there are no warning guards or ticklers at this bridge would indicate that the railroad does not consider its employees to be in any great danger when passing under the structure.

The petition should therefore be denied.

All concur.

In the Matter of the Complaint of GEORGE W. WHITEHEAD
AS MAYOR OF THE CITY OF NIAGARA FALLS *against*
NIAGARA FALLS GAS AND ELECTRIC LIGHT COMPANY as
to rates and as to service. Rehearing. [Case No. 6548.]

Service: Where a lighting company furnishing manufactured gas, although suffering from insufficient patronage, is not in a position to extend its business or even to supply the full demands of its connected consumers, but is relying instead upon a policy of restricted output in order to deliver its product at a reasonably safe pressure, the inadequacy of service thus manifested will be taken into consideration in fixing a price for the product of the utility.

Going Value: The theory of an allowance for going value is that such allowance shall in the main be based upon expenditures, if any, which the company may have made in building up its business during its earlier years. It is reasonable that meagerness of return during initial years of an enterprise which has been well conceived and wisely and energetically managed and brought to a degree of success should also in fairness be made up by the public, such failure of early return being a natural incident of the business. But where the evidence in support of an allowance for going value is limited to shortage of return which is continued for seventeen years, or during the entire life of the company, until in the aggregate it far exceeds the original investment, and there is no evidence of expenditures in building up the business except as they may be implied, an allowance for going value will not be made.

Reconstruction Value: Although the present day costs of the constituent elements which have entered into the construction of a physical plant would be largely in excess of the actual cost at the time of construction, it does not necessarily follow that such increase constitutes any present existing value which can in any possible way be realized upon; and where it does not appear that such claimed increase is reflected in the market value of the property, either as a going concern or as a disorganized plant, *quaere*, whether the enhancement can be said to exist at all.

Decided March 11, 1920.

Appearances:

Robert J. Moore, Corporation Counsel, Niagara Falls, for complainant.

Dudley & Gray (by A. W. Gray), 45 Falls street, Niagara Falls, for respondent.

HILL, *Chairman*:

An order was entered June 12, 1919, in this proceeding, fixing the rate for manufactured gas at \$1.90 per M cubic feet, with a discount of 15 cents per M for prompt payment. Said order was based on an opinion of the same date. The price so fixed was less than that which had been initiated by the company, namely \$2.20 gross and \$1.98 net. The company made application for a rehearing and that it be permitted to present proofs bearing upon the going value of its plant, thereby supplementing the proofs already presented, claiming that the rate fixed by the Commission was confiscatory and inadequate to furnish a sufficient and proper return upon the investment, etc. The rehearing was granted, and the company gave additional evidence as to the value of its property devoted to the public use, and also demonstrated that in the period which succeeded the previous hearings the expenses of operation had materially increased.

SERVICE

Since the order of June 12, 1919, a complaint of inadequate service has been filed by Mrs. John R. Shields and consolidated with this case. The Commission caused this complaint to be investigated by its chief of division of light, heat, and power, and his report was introduced into the record. This report indicates that at times the pressure at the works is not high enough to provide satisfactory service throughout the entire system and frequently too low for ordinary appliances even if they were located directly at the works, and that there occur considerable pressure drops in the distributing system, resulting in pressures at consumers' premises which are both inadequate and fluctuating, so that the service must be to a degree unsatisfactory and inefficient. The respondent alleges that the lowered pressure is the result of a more liberal use of gas by its customers due to the lower rate prescribed by the order of June 12, 1919, in this case, and the counsel for respondent

stated that "the only restraining influence that can be brought upon them [the consumers] is to cut off certain consumers arbitrarily, for us to do it or the Commission, or to put the rate at a figure which will induce people to buy coal to do their cooking as was done for centuries, rather than to use the gas and take it away from those who use a very small quantity and can afford to do it".

This attitude on the part of the company has a bearing upon the question of rates, for the reason that it seems to concede that the company, although suffering from an insufficient patronage, is not in a position to extend its business or even to supply the full demands of its connected consumers, but is relying instead upon a policy of restricted output in order to deliver its product at a reasonably safe pressure.

GENERAL CONDITION

The service, as well as the general condition of the company, has been the subject of previous complaints, and in 1918 the unsatisfactory conditions led to the employment by the city of Alfred E. Forestall, a gas expert, who examined the property and its operations and made a very complete report covering the financial, physical, and operating history and conditions of the company. The facts and conclusions reached by Mr. Forestall were not seriously questioned by the respondent. In substance it disclosed that the operations of the company over a period of eighteen years have resulted in serious financial losses, its total deficit up to 1918 being \$476,000; that the existing gas plant is entirely inadequate, the coal gas generating apparatus obsolete and uneconomical; that the existing street main system covers only part of the territory which offers a good field for and is entitled to receive gas service. The counsel for the respondent stated the company's policy to be to construct a new plant and mains which will provide an adequate and economical output and lift the company to a

level of success; that a new financial scheme was being evolved which looked to the raising of fresh capital for the necessary improvements and the funding of the large deficit referred to which is now being carried for the most part in the form of floating debt. As the Commission stated in its former opinion :

As we understand the company's financial policy, it is to use the proposed price of \$2.20 gross and \$1.98 net to enable it to make a financial showing upon which it can go into the market and embark fresh capital with a view to enlarging its business so as properly to cover the city, with the expectation that by thus improving conditions it can demand a return upon not only its present physical value but also upon its large deficit under the claim that it represents going value, and also upon such additional moneys as it may invest in order to reclaim its lost business.

It was apparent that in order to secure a fair return on any basis of valuation which could be adopted, a prohibitive rate would result. The company realized this and asked for a rate as above recited, which while high as compared with those prevailing in other communities of like size, and although unremunerative in the way of return on the valuation proposed to be claimed, would enable the company "to show some kind of a return, something that approximates taking care of its operating expenses and a reasonable return on its investment".

It appeared that the company's main source of income is its gas business, and while it had been steadily accumulating a deficit by reason of its inability to earn its bond and other interest, still the gas income had been improving up to and including 1916, in which year it dropped violently to \$887, and in 1918 there was a further drop, the books showing an operating loss of \$8039. This trend downward was due to increased operating costs. Meanwhile the corporate deficit had increased to \$476,143.

The affairs of the company had previously been the subject of examination and analysis by the officers of the

Commission in capitalization proceedings, and the fixed capital (gas) had been found to be as of December 31, 1918, \$274,235, the balance sheets as of that date being as follows:

<i>Assets</i>	
Fixed capital, electric.....	\$42,000
Fixed capital, gas.....	274,235
Materials and supplies.....	8,163
Current assets	13,997
Prepayments	2,338
Deficit	476,143
	<hr/>
	\$816,885
<i>Liabilities</i>	
Capital stock.....	\$150,000
Mortgage bonds.....	150,000
Bills and accounts owing to Niagara Falls Electrical Transmis- sion Company	370,452
Third mortgage bonds matured and unpaid.....	51,500
Miscellaneous unfunded debt.....	25,136
Reserve for accrued depreciation.....	68,797
	<hr/>
	\$816,885

In explanation of the last item it should be said that it results chiefly from the appropriation of \$45,385 in 1917, which was a book entry made in that year to bring the reserve up to a figure believed to be the minimum which could be considered adequate. As stated in the former opinion, this is merely a recognition of the company's liability for retirement losses not yet realized, and does not imply that the company has a fund of this amount either specifically set aside or invested or represented among its assets without specific segregation.

But the Commission did not regard the proposed financial plan with favor. It involved the funding of a very large deficit which had been incurred in an enterprise which after a trial of eighteen years proved to be a losing one, under a claim that such losses represented going value; and considering the history and condition of the company, the Commission determined upon a price "not so much with reference to rate of return on any given amount of capital as by consideration of what the traffic will bear; or in other words, what the public is willing to pay for the service rather than go without it altogether". The view of the Commission was that the public was entitled to be served by a company which

furnished at least reasonable facilities for an adequate service and a plant reasonably equipped to give a satisfactory service at reasonable cost, and that the respondent had not complied with these moderate requirements. The facts in this regard appear quite fully in the former opinion. A price of \$1.90 gross and \$1.75 net was thereupon fixed, the Commission stating that it was not a satisfactory determination of the questions presented and could be looked upon only as a temporary price which would serve while the company might take some reasonable period of time to determine upon a permanent policy. That price went into effect about July, 1919.

INCREASED OPERATING EXPENSES

For about a year prior to the effective date of said order, the price of \$2.20 per M cubic feet gross and \$1.98 net had prevailed. Upon the rehearing the company was therefore able to show its income account for the first six months of 1919 at the last named rates, and as thus shown the gas sales were 23,031,000 cubic feet, producing a revenue of \$50,175.71, equal to \$2.17 per M cubic feet; with operating expenses of \$46,315.95, equal to \$2.01 per M cubic feet. It was shown that at the lower rates imposed by the Commission, namely \$1.90 gross and \$1.75 net, the revenues would have been \$5297.15 less for the six months, thus showing an operating deficit of \$1437.39. During all this period operating expenses have been steadily increasing and in general are still increasing. The company now asks that its superseded rate of \$2.20 gross and \$1.98 net be restored. Assuming that it could maintain its operating revenues and costs as above shown for the first half of 1919, the showing for a year would be: revenues, \$100,351.42; operating expenses, including taxes, \$92,631.91; gross income \$7729.52. By reason of increased operating expenses it is probable that at the higher rates the gross income will be somewhat less favorable than above indicated, and in any event will yield

but a nominal income in excess of operating expenses. The view of the company apparently is that a higher rate would be commercially impracticable and have the effect of reducing consumption to a point where the revenue would be largely curtailed, while the rate which it urges will pay at least operating expenses and keep the company going until it can improve and enlarge its plant and system, at the same time having the effect of restricting consumption to a point which it is possible for it to supply with its present facilities at a reasonably safe pressure.

VALUATION

It is seen that in the disposition of this case it will not be necessary to determine the amount of "capital actually expended". The company introduced certain evidence bearing upon this subject, however, and it may be well to touch upon the principal features of this evidence, because while not necessary as a support for the order now to be made, the views of the Commission may be of value to the respondent in connection with its anticipated financial programme.

One important element of such evidence was certain testimony tending to support a very large item for going value. This item of going value was computed by the witness McDougal at \$291,043.39 on one calculation, and on another at \$333,961.81. The result in each case was arrived at by taking a certain sum representing the investment as of the year 1901, and adding \$25,000 working capital, adding each year to the actual capital any further such moneys expended, adding an 8 per cent return on the capital at the end of each year, deducting from that result the gross earnings, thus showing the loss each year up to June 30, 1919, and adding these losses to the claimed fixed capital. In a word, the annual losses on an 8 per cent return basis have been capitalized and added to the investment.

As was intimated in the former opinion, I do not believe that under the facts of this case any allowance for going

value can be made. The Niagara Falls Gas Company's plant which was taken over by the respondent in 1900 was constructed about 1860. We have no record of operations prior to 1906; since which date we have the annual reports, filed either with this Commission or with its predecessor, the Commission of Gas and Electricity. In the earlier opinion will be found a review of the history of the company, from which it clearly appears that the existing gas plant is entirely inadequate, that the generating apparatus is obsolete and uneconomical, and that the property never has been profitable, and that the business has never been brought to a successful basis. We do not understand the doctrine of the case of *People ex rel. Kings County Lighting Co. v. Willcox*, 210 N. Y. 479, to admit of the capitalization of the losses of the company over this long period of years under the circumstances stated. As stated in the earlier opinion —

The theory of an allowance for going value as laid down in the cases seems to be that such allowance shall in the main be based upon expenditures, if any, which the company may have made in building up its business during its earlier years. It is quite reasonable that meagerness of return during the initial years of an enterprise which has been well conceived and wisely and energetically managed and brought to a condition of success should also in fairness be made up by the public. Such failure of early return is a natural incident of the business. But in this case the evidence is limited to shortage of return which has continued for seventeen years, or during the entire life of the company, until in the aggregate it far exceeds the original investment, and there is no evidence of expenditures in building up the business except as they may be implied. The going value is thus not an incidental part of the valuation but composes by far the larger portion. This condition results in a requirement of a rate which the company realizes it is useless to ask for because it would be far in excess of what the traffic will bear. In the meantime important parts of the plant have become obsolete, and it appears that the legitimate field of the company's enterprise has never been followed up and occupied.

The theory of respondent's counsel seems to be that a public guaranty is behind a public utility in such wise that

the public can be called upon to make good the losses of the utility without regard to their causes or origin. We can find no authority for such a doctrine, and are of the opinion that upon the facts shown in this record no "going value" has been established.

Another item which was the subject of further testimony was the land occupied by the company's plant. An official of the company stated that although carried in the fixed capital account at \$25,010, the company could realize a much larger sum for it. Assuming this to be the fact, under the authorities the company is entitled to this added increment.

Another statement placed in the record was a calculation of the value of the tangible property based upon Mr. Forestall's statement, that the reproduction cost thereof in 1918 would have been 70 per cent greater than its actual cost at the time of installation. Other evidence was given by the witness Merritt as to reproduction costs in 1919. The statute provides that the rates shall be fixed with due regard among other things to a reasonable return upon the amount of capital actually expended. This language differs from that contained in some of the analagous statutes which make reference to a reasonable return upon the value of the property of the corporation used or useful in the public service. Whether or not these variant terms mean the same thing in substance, it is quite obvious that although the present day costs of the constituent elements which have entered into the construction of the physical plant would be largely in excess of the actual costs at the time of construction, it does not necessarily follow that such increase constitutes any present existing value which can in any possible way be realized upon. It does not appear that the market value of the securities representing the property in any degree reflects such an increase; on the contrary, the only inference to be drawn from the evidence and from the universally acknowledged facts with respect to the market values of such securities during the present period is that such market values, instead of reflecting an increase, reflect a decrease.

Neither was it attempted to be shown that any increased amount could be realized by a disorganization of the property and a sale of the constituent elements. The greatest value of these elements in a reasonably successful plant is their combined value as a going property. When this is sacrificed and the physical property is wrecked and junked, large elements of value which originally entered into their construction and installation are totally lost. These elements include labor, superintendence, engineering, legal and organization expenses, interest and insurance during construction, promotion, and other overhead costs. Especially is this true where, as in this case, the rates charged by the company, although unremunerative, are all the traffic will bear, so that increased prices would be of no avail. If the utility were able to show that at its volition it could, if it so desired, secure for its property the alleged increased value, either by selling it as a going concern or by disorganizing the plant and selling piecemeal, then it might be claimed with much force that by leaving the property in the public service a sacrifice of the realizable value is being made which should be the just measure of present value for rate making purposes. But when such is not the case, it is difficult to recognize where the claimed enhancement has any existence in fact. If it is not there in any tangible sense, if it is not capable of realization in any practical way, then it is difficult to see how it can be said to exist at all.

The amount actually expended [gas department] by this company has been the subject of frequent examination by the Commission and its officials, and the fixed capital accounts have been adjusted by the company in conformity with the results of such examinations. The value or investment as of August 31, 1918, as shown by such accounts, without any deduction for depreciation, amounts to \$274,153.08. This figure corresponds closely to Forestall's estimates, and I think it fairly represents the amount actually expended as of that date. The subsequent financial operations and any

necessary consideration of depreciation reserves can be readily adjusted to this figure, and the increased market value of land taken into account as well as an allowance for working capital.

I think that upon the record in this case the claim for increased investment based upon the advanced costs of present day reconstruction has not been sustained. These statements are not intended as a determination of the company's investment, or of the values of its property devoted to the public use. As stated above, such a determination is not necessary for the disposition of this case, and is therefore not made; but it is felt that the respondent is entitled to some expression of the views of the Commission on the items discussed, having in mind the bearing that such views may have upon the future proceedings of the company.

RATES

The statute which governs the making of rates is section 72 of the Public Service Commissions Law, which provides that —

In determining the price to be charged for gas or electricity, the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question . . . with due regard among other things to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies.

In this case, however, the company realizes that a rate which would, on its face, produce a reasonable average return upon capital actually expended, would be so high as to curtail revenue. The reasons for this appear clearly from the facts disclosed in the Forestall report, the previous opinion in this case, and the statements hereinabove set forth.

As stated by Chairman Stevens in *Buffalo Gas Co. v. City of Buffalo*, P. S. C. 2nd Dist., at p. 630 —

The public should be required to pay a return only upon a plant which is suited and adapted to its needs with of course a reasonable allowance for future expansion and growth, which is just as important for the public as it is for the company; and if a given plant is not

suited and adapted to the needs of the public which it serves, but is more extensive in capacity than is reasonably required for such needs and reasonable development in the future, or if it has been extravagantly constructed, then clearly and upon the plainest principles of equity and justice the company should not be entitled to a return beyond that which would be demanded upon a plant properly located, economically constructed and suited in capacity to the needs for which it is designed.

In *Buck et al. v. Judge*, decided July, 1919, the Commission held that the public is entitled to be served by a reasonably modern plant which is not obsolete or wasteful in its method and which turns out its product with some reasonable degree of economy, and that under the facts in that case, which are very similar in principles to those found here, neither the amount of the investment nor the fair value of the property used in the public service was necessarily the measure by which the Commission must determine a just and reasonable rate.

It is the function and the duty of the utility to supply its product with reasonable business judgment and economy, and the employment of equipment and facilities designed to serve such consumers as are within its field and demanding its service. Unless these ordinary requirements of good business policy are complied with, it can be readily seen that an unreasonably high price will be required in order to yield a reasonable rate of return on the capital employed.

This Commission has frequently enunciated the rule, that while ordinary faults of service which are susceptible of remedy should not be allowed to have a bearing upon rates, still where the service is shown to be inherently or generally bad, and not susceptible of correction, the rule is to the contrary.

In this case it would appear that none but an exorbitant price for its product, a price which it would be useless to impose even if the company had the right so to do, will yield any substantial return on the capital expended. The com-

pany during its history, which has been unprofitable, has accumulated a deficit considerably in excess of its actual investment, and is constantly running in arrears. In order to operate with any chance of success it must renew its coal gas plant and make large extensions to its mains. Its fixed capital, gas and electric, as of a recent date was something in excess of \$300,000, its bonded debt about \$200,000, and its floating debt about \$400,000. Its deficit was \$476,000, which by reason of constant loss in its operations is steadily increasing. The new outlay required for improvements and extensions is estimated at \$175,000. The company's tentative plan to meet this situation is to increase its funded debt to the extent necessary to defray the costs of the needed improvements and extensions and to absorb and cancel its deficit. As a preliminary step it desires to increase its rate for gas. It admits that its service pressure is too low, and that the increased price will be of assistance in this respect because it will drive a certain percentage of its consumers off the lines, thus rendering the service more nearly satisfactory to those who remain. Another argument advanced is that in order to bring about its proposed new financing the company must be able to put forward a favorable financial prospectus which will appeal to the investing public. The present price for gas is high when considered relatively with prices prevailing elsewhere in communities of comparable size.

Assuming the views of the Commission as to a proper rate base to be approximately correct, the proposed financial plan would load the company with fixed charges largely in excess of its ability or even its right to earn. This scheme would seem to be neither sound nor permissible. The Commission is of the opinion that the large accumulated deficit should be faced by the owners of this property as a loss already made, and eliminated from the liabilities. With a capital account limited to moneys actually expended, both past and future, and with the necessary improvements and

extensions and an aggressive business policy, the company may still achieve success, but any greater load would seem to be beyond its ability to carry even assuming its legal right to attempt it.

The reasons assigned by the company for the restoration of the \$2.20 rate [\$1.98 net] are not such as the Commission can entertain. Where an increase in rate has the effect of restricting output, such restriction must be regarded as an unfortunate but unavoidable incident of the increase. But to increase a rate for the purpose of restricting output so as to justify the inability of the company to supply reasonably good service to its consumers would be a proceeding hostile to all principles of public utility regulation.

As previously stated, the present rate of \$1.90 gross and \$1.75 net is high as compared with rates in cities of similar size with Niagara Falls. It was fixed as a commercial rate, or what the traffic would bear, upon the grounds stated in the former opinion. The fact that the higher rate which it succeeded, and the restoration of which is now urged, had the effect of restricting output, indicates that the higher rate was more than the traffic would bear. It was fixed, furthermore, as a temporary rate which would serve only while the utility was determining upon a permanent policy, it being recognized that a financial reorganization was necessary in order to restore the financial integrity of the company. It was fully as high in all probability as would be necessary to yield a reasonable return upon capital actually invested after the company had rebuilt its plant, extended its lines, and effectually covered the field which lies open to it. This view is confirmed by the Forestall report. The company advances the argument that it needs the new rate as a basis for a financial showing upon which it can bring about the contemplated reorganization. The implication is that with such a figure as a basis the company would be able to demonstrate that with a new plant, extended mains, and added business, it would be able to earn a reasonable return upon

its investment and also upon its large deficit. For reasons above stated, the Commission can not look upon that argument with favor.

The rate which the company demands will yield slightly more than operating expenses. The present rates will yield slightly less. We do not consider the variation vital. The question of confiscation does not enter. Neither rate will produce a compensatory return on the conceded investment, nor will any rate which the traffic will bear.

The views expressed lead to a denial of the application, and an order will be entered accordingly.

All concur.

In the Matter of the Petitions of THE NEW YORK, LACKAWANNA AND WESTERN RAILWAY COMPANY, THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, the TOWN BOARD AND BOARD OF HIGHWAY SUPERINTENDENTS OF THE TOWN OF CHEEKTOWAGA, Erie county, and the PRESIDENT AND TRUSTEES OF THE VILLAGE OF SLOAN, Erie county, for the elimination of the Harlem Avenue grade crossing of the New York, Lackawanna and Western Railway, the Lehigh Valley Railroad, the Erie Railroad, and the Lehigh and Lake Erie Railroad in the town of Cheektowaga and village of Sloan, and the Kennedy Road grade crossing of the New York, Lackawanna and Western Railroad, the Erie Railroad, and the Lehigh Valley Railroad in the town of Cheektowaga, Erie county. [Case No. 2805.]

Where, in a grade crossing elimination, the cost of the work is increased on account of a breach of contract either by the railroad company or the contractor, the additional cost on account thereof paid by the railroad company can not be allowed on an accounting as a proper disbursement to be contributed to by the State.

Decided March 11, 1920.

Appearances:

Stanchfield, Lovell, Falck & Sayles (by Halsey Sayles), Elmira, attorneys for The New York, Lackawanna and Western Railway Company and The Delaware, Lackawanna and Western Railroad Company.

M. B. Pierce, 50 Church street, New York city, attorney for United States Railroad Administration and Erie Railroad Company.

George E. Boyd, Division Engineer, The Delaware, Lackawanna and Western Railroad Company, Buffalo.

A. Cook, engineering department, Erie Railroad Company, 50 Church street, New York city.

W. H. Gahagan, representing the W. H. Gahagan Company, contractors.

KELLOGG, Commissioner:

Upon its eighth accounting for disbursements made in connection with the work of eliminating the Harlem Avenue grade crossing in the town of Cheektowaga, in accordance with a determination of this Commission dated March 30, 1916, under section 91 of the Railroad Law, The Delaware, Lackawanna and Western Railroad Company claims reimbursement among other things for an item set forth in said account, "for additional cost of work performed in 1918, over contract price, as per detailed statement from W. H. Gahagan, \$42,980.20".

It appears that the contractor, Gahagan, entered into an agreement with the railroad company, bearing date of July 19, 1916, whereby he agreed to perform certain of the work involved in this grade crossing elimination. The work which he was to do consisted in building the piers, abutments, and sewers, laying the floor on the bridge, and grading the approaches. The steel work was to be erected by the railroad company, after which the construction of the floor of the bridge and the water proofing of the paving was to be performed by the contractor.

By the terms of the contract the piers, abutments, and sewers were to be completed by November 1, 1916, the steel superstructure was to be erected by the Spring of 1917, and the entire work then to be performed by the contractor was to be finished by September 15, 1917.

For various reasons, but principally on account of the failure of the railroad company to complete the erection of the steel work, as it had agreed, in the Spring of 1917, the contractor was unable to complete his work in the specified time, and did not succeed in finishing it until November 28, 1918.

Prior to this completion, it became apparent that the cost to the contractor would be very greatly enhanced by the increased cost of labor. The contractor complained of the delay to which he had been subjected, and although he did

not firmly plant himself on a claim of right to rescind the contract, or to recover damages, an arrangement was entered into between him and the railroad company whereby he continued the work to its completion, after the delivery of the steel, upon an agreement whereby he was to receive actual cost for the work performed. This actual cost was in excess of the cost based on the unit prices specified in the contract by the sum of \$42,930.20, the amount of the item in question.

This amount has been paid to the contractor by The Delaware, Lackawanna and Western Railroad Company, and the several corporations involved have contributed to it their proportionate shares. The railroad company now desires to be allowed this item on its eighth accounting, and if its position is conceded, the State will be required to pay one quarter of this amount, or something in excess of \$10,000.

Whatever equity or merit there may be in the contractor's claim, if any, should not be a controlling factor here, because this Commission has no authority to dispose of the money of the taxpayers of the State, except in the discharge of legal rights and within its statutory limitations.

It is not entirely clear from the evidence whether under the circumstances the contractor could have enforced collection of this amount from the railroad company. A valid contract had been previously entered into requiring him to perform this work at specified unit prices, and unless it was broken by the other party, the contractor would have been held to its terms. If he had no legal claim against the railroad company for the amount paid to him, and the amount is voluntarily paid by the railroad company, it can not properly be allowed as an item in the accounting.

On the other hand, if he had a claim by reason of the fault and delay of the railroad company in erecting the steel work, an obligation which it had assumed, then the railroad company can not in justice be entitled to reimbursement for money paid by it on account of its liability as a result of its own neglect and failure to perform.

An application which was made to this Commission to increase the unit prices was not granted, and there is nothing in the record to indicate that any part of the delay was caused by any fault on the part of the State. It is conceded by counsel for the railroad company that it breached its contract with Gahagan. The excuse given by it for such breach, to wit the inability on its part to procure the material for the steel work, does not in law excuse it from performing the obligation it had assumed.

The contract required the railroad company to construct the steel work, and to do so in the Spring of 1917. It required the contractor thereafter to proceed to the completion of the work by September 15, 1917. By reason of this failure of one party or the other to the contract, or of both, to perform in accordance with its terms, the work was delayed so that increased cost of construction was incurred, by reason of which increased wages were necessarily paid. The increased cost arose by reason of the failure of one or both of the parties to perform their contractual obligations, and is not, as to any part of it, a legal charge against the State.

The item should be disallowed as a charge against the elimination to be contributed to by the State.

All concur.

In the Matter of the Complaint of JOHN A. CONNOLLY *against* A. S. BURLESON, POSTMASTER GENERAL, NEW YORK TELEPHONE COMPANY, and the Company Operating the HOTEL ASTOR as to rates charged at public telephones in the Hotel Astor, New York city. [Case No. 6611.]

In the Matter of the Complaint of LOUIS J. HAND *against* A. S. BURLESON, POSTMASTER GENERAL, NEW YORK TELEPHONE COMPANY, and Owners of Apartment House at 606 West 135th street, New York city, as to rate proposed to be charged at public telephone in said apartment house. [Case No. 6612.]

In the Matter of the Complaint of CORNELIUS M. SHEEHAN *against* A. S. BURLESON, POSTMASTER GENERAL, NEW YORK TELEPHONE COMPANY, and the Company Operating the PLAZA HOTEL as to rates charged at public telephones in the Plaza Hotel, New York city. [Case No. 6615.]

In the Matter of the Complaint of MRS. JAMES S. NICKERSON *against* A. S. BURLESON, POSTMASTER GENERAL, NEW YORK TELEPHONE COMPANY, and Owners of IVY COURT APARTMENTS at 210, 220, 230 West 107th street, New York city, as to a telephone charge in said apartments. [Case No. 6633.]

When a public utility company installs telephones within a hotel they are installed as part of its public utility system, and the extensions to the various rooms of the hotel are made to reach the consumers of the utility company's product, which product is telephone service. Telephones are also installed in a hotel for the use of the hotel company, its employees and guests, in rendering hotel service to its guests. That portion of the service which is rendered outside the walls of the hotel is in its nature public utility service and should be classified and paid for as such, and the regulation of the rates for same is a matter for the Public Service Commission. The work done by employees of the hotel in giving "outside the walls" service is negligible when compared with the work done by the employees of the utility company. In rendering such service substantially the entire

plant used, from the instrument in a guest's room to the instrument at the other end of the call, is the property of the public utility company.

Decided March 16, 1920.

Appearances:

John A. Connolly, 251 West 91st street, New York city, complainant in case No. 6611, in person.

Cornelius M. Sheehan, 788 McDonough street, Brooklyn, complainant in case No. 6615, in person; also by *Leo K. Mayer*, 1307 Putnam avenue, Brooklyn, as attorney.

M. H. Winkler, 59 Wall street, New York city, in his own behalf.

Mark Goldberg, 302 Broadway, New York city, Assemblyman representing 14th Assembly District.

William P. Burr (by *Edgar P. Kohler*) as Corporation Counsel of the City of New York.

Campbell & Boland, 51 Chambers street, New York city, attorneys for Hotel Astor.

Babbage & Sanders (by *Mr. Sanders*), 111 Broadway, New York city, attorneys for Plaza Operating Company.

John L. Swayze, general counsel, and *Frankland Briggs*, attorney, 15 Dey street, New York city, for New York Telephone Company.

Mrs. James S. Nickerson, 210 West 107th street, New York city, complainant in case No. 6633, in person; also *A. S. Barnes*, 87 Nassau street, New York city, as attorney.

Oscar and *H. V. Dike* (by *F. H. Dike*), 210 West 10th street, New York city, owners of Ivy Court Apartments.

Mrs. James J. O'Reilly, 55 West 106th street, New York city, in person.

Mrs. H. M. Platto, *Mrs. Dayharsh*, *Mrs. Paula Polaretsky*, *Mrs. Julia Fick*, *Mrs. Katina Nichols*, tenants at 607 West 139th street, New York city, in person.

Mrs. E. Horter and *Mrs. A. C. Camp*, tenants at 210 West 107th street, New York city, in person.

Charles A. DuBois, 3551 Broadway, New York city, real estate agent, in person.

J. Shenk, owner of apartment house No. 66 West 107th street, New York city, in person; also by *Morrison & Schiff* (by Samuel W. Dorpman), attorneys, 320 Broadway, New York city.

Victor Spitzer, 52 Cathedral Parkway, New York city, appearing as a citizen.

FENNELL, Commissioner:

This investigation was instituted upon two complaints: one filed by John A. Connolly against New York Telephone Company and the Hotel Astor [case No. 6611], and the other by Cornelius M. Sheehan against New York Telephone Company and the Plaza Hotel [case No. 6615]. These two cases were heard together, and the testimony taken was to be regarded, so far as applicable, to the case of Hand against New York Telephone Company and owners of apartment house No. 606 West 135th street, New York city [case No. 6612], and the case of Mrs. J. S. Nickerson against New York Telephone Company and Ivy Court Apartments [case No. 6633]. These cases involve the right of the proprietors of hotels and apartment houses in New York city to charge for telephone service at rates in advance of those charged by the telephone company. Both hotels and apartment houses are hereinafter designated as hotels.

The telephone apparatus inside the hotel, excepting cable conduits within the walls, and with the exception of some telephone booths, is the property of the telephone company.

The usual practice is to charge ten cents for local out-calls limited to five minutes. There are also some pay-booths for which a charge of five cents per limited message is made to the user, in which case one cent of the message price is paid

to the hotel company for the use of space. The rate paid by the hotels is for private branch exchange service, which includes a rental based on the size of the installation plus two and one-half cents a call limited to five minutes.

Considerable testimony was taken and a number of exhibits filed showing the telephone business done by a number of the larger New York hotels. It appears from the evidence that the amounts paid to the telephone company by the hotels is about 60 per cent of the amount collected from the users of the telephones for outgoing calls. It is claimed on behalf of the hotels that the balance, about 40 per cent, is absorbed by charges against the service on the part of the hotel company, including wages of switchboard operators, their meals, bonuses paid to them, compensation insurance on them, and a certain portion of the cost of maintaining the general bookkeeping, accounting and comptrolling departments of the hotel; also management, stationery, etc. In addition, a debit charge is made for the space occupied.

The first question to be decided is one of jurisdiction. If the hotel-telephone system is operating as a public utility, the Commission has power to regulate; if operating as a hotel facility, the Commission has not such power.

The hotel-telephone system is utilized for two classes of service: hotel service conducted entirely within the hotel, and telephone service conducted almost entirely outside the hotel.

The character of service will show, from its very nature, the group in which it falls. For instance, a call from a guest's room to the hotel switchboard operator regarding a morning "wakening call," request for baggage porter, or any of the numerous usual hotel conveniences or necessities, is clearly a call in which the hotel is interested *as a hotel*. When the telephone system is used for such service, it is clearly a hotel facility furnished by the hotel for the accommodation of its guests for usual hotel purposes. As to all hotel services requiring the use of the telephone system, the hotel switchboard operator, acting as an employee of the

hotel, performs the switchboard work necessary thereto. Such service is deemed necessary and convenient by the hotel management or it would not be used.

The proprietor may measure the service he gives by a daily rate which the guest may take or leave at his option, but when he has a system in operation in his hotel which is susceptible of a double use, which may be both hotel facility and a public utility, he is entitled to charge the guest in his room rent for that portion of the service which is rendered as hotel service, but not the portion rendered as public service.

Assume two telephones in each guest room, one connected with a house system only and giving connection through the hotel switchboard with the various hotel departments and guest rooms, the other system connected with a telephone company switchboard in the lobby and giving connection only with the outside world. The first is clearly a hotel facility. The second is clearly a public utility. Now assume one telephone system in the hotel, with all the above connections of both systems but with two switchboard operators sitting beside each other, one at a "house" switchboard, the other at a "public" switchboard. Assume all calls come first to the house switchboard, and the operator at that board handles all "house" calls and turns over to the other operator all calls to or from outside. Is there any question that one class of calls still remains hotel service and the other remains telephone service? If as a matter of good business and sound economy one operator handles both classes of business, surely the nature of the business does not change, and it is the nature of the business that must control the decision herein.

The use of the hotel telephone which is "hotel" use should be treated and paid for as such. The use which is "telephone," in the public utility sense, should be treated and paid for as such. The telephone company is rendering this latter service. The portion furnished by the hotel is so slight as to be negligible. The public utility must not be

hampered in its growth or use by any additional cost for the use thereof, because the physical location of hotel telephones permits the proprietor of the hotel to charge for the use of the public utility a commission or extra rate for the convenience of the user. The telephone utility may have to pay rental for the use of the hotel premises, but when such rental is paid the utility is entitled to the benefit of the rates provided for in its filed schedules. Practically the entire service rendered the guest in an outside telephone call is furnished by the telephone company which receives two and one-half cents plus the proportionate share of the service charge (a very small fraction of one cent), and the hotel receives seven and one-half cents less the same fraction.

After all, it is for the public benefit that public utility companies exist. The public that pays rates is entitled to have the utility operate at full efficiency and upon sound economic principles. The result of this kind of operation is finally reflected in lower rates to the public and in increased business. When a public utility company installs its telephone system within a hotel, it is installed there as part of its public utility system and is extended to the various rooms of the hotel to reach the consumer of the utility company's product. The hotel is the "subscriber" and is the "listed party," but when guests use "out-calls" or receive "in-calls" they are the actual consumers or users of the service of the public utility and the hotel is not the user. While guests can not well be "listed," nevertheless telephones are put in the guest rooms so that the guests may have easy access to all hotel facilities and also access to the entire public telephone system of the country. Both of these are furnished by the telephone system although the "within the walls" operation is conducted by employees of the hotel. The hotel does not charge for interior calls, which is hotel facility service and is furnished entirely by the hotel employees (of course by the use of the telephone system rented from the telephone company). The hotel, however,

does charge for outside calls where its employees render practically no service. From this it will be seen that the proprietor of a hotel is charging, not for service of a hotel facility character, but is charging for service of a public utility character. This latter business the hotel proprietor has no legal authority to conduct. Hotel companies are not public telephone corporations.

If a private 'phone is installed, the subscriber may well permit others to use his 'phone or refuse its use entirely, but he should not be allowed to sell service unless he does so as an agent of the telephone corporation and thus be under regulation of the Public Service Commission and have the service rendered in accordance with a filed schedule of rates.

The uncontrolled retail selling of telephone service by those unauthorized to conduct such a business is contrary to the spirit of the legislative regulation of public utility companies and the service rendered by them. If the economic retail price of messages is higher than the scheduled rate, then the public utility company is rightly entitled to the increase so that such increase may go into the revenues of the public service company that renders the service and thus help to reduce some other rates. A subscriber may have his 'phone entirely for private use or may commercialize the use at his option, but if he does commercialize the use he is thereupon engaging in the business of selling telephone service; and as he has no legal right to engage in that business or to sell such service, except as agent for the telephone corporation, he can only sell it as such agent and at such rates and charges and under such rules and regulations as are fixed in accordance with the Public Service Commissions Law. The jurisdiction of the Public Service Commission extends to the ultimate use of telephones where *rates* are *charged* for such use; the charging makes it the business transaction of selling telephone service. Hotel proprietors have not the right to fix a schedule of rates for telephone calls from hotel lobbies or guest rooms to points outside the hotels. If the

proprietor of a hotel permits a public utility company to install its system upon the hotel property to reach telephone users in the hotel lobby and in guest rooms, a fair agreement may be made for such use of the premises, but the permission to use such hotel premises to install a telephone system does not change the nature of the service—it remains *public service*, subject to regulation—and such permission can not transmute a hotel company into a public telephone corporation possessing the functions of such a corporation but free from its duties.

The Massachusetts Public Service Commission has held that a telephone company can not lawfully render telephone service to licensed hotel and inn keepers at wholesale, and permit such service to be re-sold by the subscriber to the public, directly or indirectly, through a charge for the use of the instruments and apparatus. (*Re hotel telephone service and rates*, P. U. R. 1919, Vol. A, page 190.)

The New York Telephone Company should file a schedule of rates for the city of New York applying to apartment houses, hotels, including corridor and guest room service, for calls to points outside such apartment houses and hotels. As the preparation of such a schedule will require careful investigation, and as all the interested parties should have an opportunity to be heard, the schedule should be filed on or before May 1, 1920, effective June 1, 1920.

An order has been made accordingly.

Chairman Hill and Commissioner Barhite concur; Commissioner Irvine dissents; Commissioner Kellogg not present.

Petition or Complaint of THE NEW YORK AND NORTH SHORE TRACTION COMPANY, filed February 14, 1920, under subdivision 1, section 49, Public Service Commissions Law, and section 181, Railroad Law, for permission to further increase passenger fares. Also for permission to put tariff in effect on short notice. [Case No. 7345.]

Decided March 23, 1920.

Appearances:

Frueauff, Robinson & Sloan (by W. B. Robinson), 60 Wall street, New York city, for the petitioner.

George Schmidt, Village President, Mineola; *F. P. Seaman*, Mineola; *E. W. Weeks*, East Williston; *L. D. Howell*, Mineola; *E. J. Gilligan*, Mineola; *M. J. Berling*, Mineola; *S. M. Howell*, Manhasset; *Andrew McAllister*, Hicksville; *George Latham*, East Williston; *George A. Littlejohn*, Mineola; *Joseph Andrews*, Mineola; *H. M. Seaman*, Mineola; *Floyd Davis*, Mineola.

FENNELL, Commissioner:

On February 14, 1920, The New York and North Shore Traction Company filed a petition asking that it be permitted to increase its rates which were fixed by order of this Commission June 26, 1917, in case No. 6024. A hearing was held at Mineola on March 13, 1920.

It appears in this case that certain franchise fare restrictions were agreed upon at the time the original consents were given by the local authorities of the municipalities in which the lines were proposed to be operated. The franchises that were obtained from these local authorities contain provisions that the company will be bound by the restrictions in a franchise received by the company from the Board of Supervisors, and similarly bound by any amendments thereof. The company petitioned the Board of Supervisors for a waiver of the fare restrictions to the extent of the increases shown in the proposed schedule of

rates. The petition was signed by from fifteen hundred to two thousand people. The Board of Supervisors held a hearing at which no objection was raised.

The Board of Supervisors on February 2, 1920, waived the franchise restrictions to the extent shown by the proposed rate schedule. It is claimed on behalf of the company that the consent by the Board of Supervisors to the increase of fares by amending the controlling franchise carried the amendment into the franchises received from the local municipal authorities. It was stated that the attorney for the Board of Supervisors agreed with this contention. While there may be some question as to the legality of this delegation of power to amend local franchises by the Board of Supervisors, which board in this locality controls the county highways, the question has been taken out of this case by the filing, since the hearing on March 13th, of waivers of franchise restrictions by the Towns of Oyster Bay and North Hempstead to the same extent as the waiver by the Board of Supervisors. There is no increase of rate in the village of Mineola.

At the hearing proof was given supporting the proposed increase of rates. No evidence was given to the contrary. There appeared to be no objection to the new schedule of rates. Certain individuals stated they were willing to pay higher rates than shown in the schedule.

On August 28, 1919 (case No. 2411), the First District Commission permitted increases in fares in Queens county. It is claimed by the company that such increase was barely sufficient to defray the increase in the payroll made effective upon the increase.

The First District Commission in 1912, after an examination of the property of this company and a checking up of its accounts, permitted the issuance of \$897,500 in stock and \$800,000 in bonds. [Case No. 1398, First District.] Thereafter additional stock was issued to the extent of \$81,850. [Case No. 1770, First District.] The com-

pany's fixed capital account as of June 30, 1917, was \$1,612,008.39. [Case No. 2217, First District.] The fixed capital as of June 30, 1919, was stated by the company's auditor to be \$1,610,811.

It further appears that the company has only paid interest four and one-half years out of the twelve it has been operating; that the last interest was paid in October, 1918, and that no dividends have ever been paid on the stock. It is claimed that the total deferred maintenance is approximately \$70,655.84.

The gross income for the year ended June 30, 1919, was \$4781.32. If non-operating revenue for the year ended June 30, 1919, is excluded, an operating deficit of \$2151.90 appears. There were net corporate deficits for the years 1917 and 1918 as well.

The company has not been operating since March 1st on account of the ice and snow conditions caused by the very heavy storms of that time and the succeeding thaw and rains which have flooded various portions of the track. The company officials expressed the opinion at the hearing that with fair weather conditions operations could be commenced probably in two or three weeks. Added to the above physical impediments is financial difficulty. The company owes about \$10,000 in bills and \$20,000 in taxes. It is also claimed that it would be practically impossible to resume service without making some repairs.

It would seem from the foregoing that the petition for increased rates should be granted and the rates be permitted to go into effect on five days' notice.

The order accompanying this Opinion sets forth the rates petitioned for and which are made effective thereby.

All concur.

Petition of RALPH D. DEMONEY under chapter 667, laws of 1915, for a certificate of public convenience and necessity for the operation of a stage route for passengers and freight by auto buses in the city of Binghamton, it being proposed that the route shall also be operated to the incorporated village of Afton, Chenango county. [Case No. 7360.]

A certificate of convenience and necessity should be granted an auto bus line to operate over a highway connecting communities already served by a steam railroad, where on account of the distance of the railroad stations from the village centers and the intervals between stations a substantial portion of the population along the route will be better served by the bus line.

Decided March 25, 1920.

Appearances:

Edward F. Ronan, Binghamton, as attorney for petitioner.

Newton R. Cass, Albany, as attorney for The Delaware and Hudson Company.

KELLOGG, Commissioner:

The stage route over which the petitioner in this proceeding proposes to operate his conveyances runs from 103 Court street, in the city of Binghamton, through Court and Chenango streets to the city line, thence through various villages and hamlets to the village of Afton, Chenango county, a distance of about thirty-two miles.

The consent of the city authorities and the application of the petitioner here exclude the right to carry passengers and property locally in the city of Binghamton. Such carriage if permitted would be in competition with the local street railroad operated by the Binghamton Railway Company.

The consent of the local authorities contains requirements as to payment of annual license fees and compliance with municipal ordinances.

The proposed route shortly after leaving Binghamton passes the site of the Broome County Tuberculosis Hospital, now unserved by public conveyance. Between the termini of this proposed route at Binghamton and Afton, one of the steam railroad lines of The Delaware and Hudson Company extends. Over this route there are now operated each way five trains on week days and three on Sundays.

The railroad company objects to the granting of the certificate applied for, alleging that the needs of the localities are sufficiently served by the operation of its trains, and that the stage route in question if established would materially deplete its revenues from local traffic. Undoubtedly the trains of the steam railroad run with sufficient frequency through the localities in question, and no complaint can properly be made in that regard.

There are between Afton and Binghamton on the line of the railroad six intermediate stations. The distance is 28.2 miles. Such stations occur, therefore, at intervals of about four miles on the average. The highway through the villages along this route, although running in the same general direction, is somewhat removed from the line of the railroad, so that the stations by which the villages are served are from one-half mile to two miles distant therefrom.

It therefore results that along this route, which is fairly well populated, the distance from the railroad stations in many instances renders the steam railroad much less convenient than would be an auto bus line operating on this prominent thoroughfare, on or near which most of the residences of the people to be served are located.

The fare proposed to be charged by the stage route is \$1.25 from Binghamton to Afton. The fare charged by the railroad is \$0.85. The time necessarily occupied for the full trip by an auto bus on the proposed stage route will be two hours. The time required by the railroad trains to traverse the distance is about an hour and ten minutes. The distance over which the stage route must operate is given as 32 miles, as against the shorter distance of the railroad line

which is 28.2 miles. We thus have a situation where a passenger proposing to use the stage route must cover a longer distance in a less comfortable conveyance, take a greater length of time, and pay an increased cost than if patronizing the steam road. Notwithstanding this fact, the general passenger agent of the railroad company testified at the hearing that the proposed stage route if operated would divert from 35 to 50 per cent of the local passenger traffic.

This indicates clearly that on account of the distance and inaccessibility of the railroad stations, and notwithstanding the frequency of train service, a very substantial number of people on the route would prefer to travel by the stage line notwithstanding its comparative disadvantages in other regards.

Undoubtedly the kind of service offered by the proposed new auto bus line, passing as it does the doors of its patrons in many cases, and stopping wherever requested, serves a public convenience and supplies a public necessity which the more remote steam road with its infrequent stops at stations at a distance more or less removed from the main line of travel does not now supply.

A certificate of convenience and necessity should therefore be issued, subject to the conditions attached to the consent of the local authorities.

All concur.

No. 488:169

In the Matter of Rate to be Charged for Gas by UTICA GAS AND ELECTRIC COMPANY in the Utica District. [Case No. 3399.]

Decided April 1, 1920.

Appearances:

August Merrill, Corporation Counsel, Utica.

Milo R. Maltbie, New York city, consulting expert for City of Utica.

J. F. Hubbell (by James D. Judson), Utica, attorney for Utica Chamber of Commerce.

Neil F. Towner, Albany, attorney for Utica Gas and Electric Company.

F. M. Tait, President; *Frank B. Steele*, Vice-president; *M. J. Brayton*, Vice-president and Secretary, Utica Gas and Electric Company.

FENNELL, Commissioner:

On May 29, 1919, the above company filed a new schedule of rates effective July 1, 1919, increasing all of its rates for gas 15 cents a thousand cubic feet, so that the new rates would be —

Block Meter Rate:				
First	25,000 cu.ft.	per month,	\$1.25	per M cu.ft.
Next	25,000 cu.ft.	per month,	\$1.15	per M cu.ft.
Next	50,000 cu.ft.	per month,	\$1.05	per M cu.ft.
Next	150,000 cu.ft.	per month,	\$1.00	per M cu.ft.
Next	250,000 cu.ft.	per month,	\$0.90	per M cu.ft.
All over	500,000 cu.ft.	per month,	\$0.85	per M cu.ft.

A minimum charge of 50 cents a month, and a discount of 10 cents per thousand cubic feet for prompt payment, to remain the same.

On June 30, 1919, August Merrill, esq., Corporation Counsel of Utica, objected to the schedule of rates going into effect as being contrary to an existing order of the Commission. By the Commission's order dated April 14, 1914, the then rates were to be gradually reduced until July 1, 1916,

at which time the rate would become \$1.10 a thousand cubic feet with a discount of 10 cents for prompt payment. A minimum charge of 50 cents a month was allowed to stand. This rate was to continue for a period of three years after July 1, 1916, unless otherwise ordered by the Commission.

The Commission decided that the schedule of rates filed on May 29, 1919, would not become effective as a "30-day schedule" on July 1, 1919, and that the then existing schedule of rates continued effective until the proposed rates were proved to be reasonable. Hearings were held and the evidence was finally closed in the latter part of December, 1919. The annual report covering the gas operations of the company for the year 1919 was filed March 23, 1920.

The plant of the company is divided into two districts, the Herkimer and the Utica districts. The Utica district includes Utica, Whitesboro, Yorkville, New York Mills, New Hartford, and Schuylers. The Herkimer district includes Ilion, Mohawk, Herkimer, Little Falls, and Frankfort. (Frankfort was formerly in the Utica district.)

The complaint in this case against the new schedule is by the City of Utica, and the city insists that the rates in the city of Utica be based upon segregated property values, revenues and expenses for the city of Utica alone. The company insists on treating the Utica district as one district.

The value of the company's property used in supplying gas in the city of Utica, according to the city's claim, amounts to \$1,153,500. An 8 per cent return on this rate base would be \$92,280. Measured by M c. f. gas sold in 1919, this return would equal, per M c. f., \$0.202.

The company's claimed value of gas property in the Utica district amounts to \$2,830,909. An 8 per cent return on this rate base would be \$226,473. Measured by M c. f. gas sold in 1919, this return would equal, per M c. f., \$0.45.

In addition to the foregoing differences as to value of the gas property, the city and the company differed as to cost per M c. f.

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The city claims the cost of gas in Utica should be \$0.833 per M c. f. The company claims that its books show a cost of \$1.084 for the first nine months of 1919. According to the company's report for 1919, the cost was \$1.063.

Following is a tabulation setting forth the items as claimed by the city, and as shown by the annual report of the company, for 1919:

TABLE I
Comparison of gas costs per M c.f.

Item	City's claim, maximum		Company's claim, minimum		1919 figures as per Com- pany's annual report to P. S. C.
	Reference	Amount	Reference	Amount	
Cost per M c.f.:		Dollars		Dollars	Dollars
Production:					
Works, superintendence, and labor.....	City's Exh. Y-1.....	.042	City's Exh. D-1.....	.042	.043
Boiler fuel and water.....	City's Exh. Y-1.....	.047	City's Exh. D-1.....	.051	.052
Generator fuel.....	City's Exh. Y-1.....	.133	City's Exh. D-1.....	.133	.135
Water gas oil.....	City's Exh. Y-1.....	.220	City's Exh. D-1.....	.322	.300
Purification supplies.....	City's Exh. Y-1.....	.004	City's Exh. D-1.....	.008	.002
Miscellaneous works expense.....	City's Exh. Y-1.....	.008	City's Exh. D-1.....	.008	.008
Repairs works.....	City's Exh. Y-1.....	.026	City's Exh. D-1.....	.031	.031
Residuals produced, Cr.....	City's Exh. Y-1.....	.010	City's Exh. D-1.....	.010	.011
Total production cost per M c.f. made	City's Exh. Y-1.....	.470	City's Exh. D-1.....	.581	.560
Used by company.....	City's Exh. Y-1.....	.002	City's Exh. D-1.....	.077	.002
Unaccounted for.....	City's Exh. Y-1.....	.065	City's Exh. D-1.....		.078
Total production cost per M c.f. sold.....	City's Exh. Y-1.....	.537	City's Exh. D-1.....	.658	.639
Transmission and distribution.....	City's Exh. Y-1.....	.085	City's Exh. D-1.....	.088	.088
Commercial.....	City's Exh. Y-1.....	.088	City's Exh. D-1.....	.075	.074
General, except amortization.....	City's Exh. Y-1.....	.086	City's Exh. D-1.....	.103	.105
General amortization.....	City's Exh. Y-1.....	.057	City's Exh. F-1.....	.080	.080
Total operating expenses.....	City's Exh. Y-1.....	.833	City's Exh. F-1.....	1.003	.986
Taxes.....	City's Exh. Y-1.....	.055	City's Exh. F-1.....	.076	.073
Uncollectible bills.....	City's Exh. Y-1.....	.005	City's Exh. F-1.....	.003	.003
Total revenue deductions.....	City's Exh. Y-1.....	.803	City's Exh. F-1.....	1.084	1.063
Utica differential.....	City's Exh. Y-1.....	.080	.....	.....	.....
Offsetting incidental revenue.....	City's Exh. Y-1.....	.080	.....	.....	.....
Cost of gas, excluding interest on investment.....	City's Exh. Y-1.....	.833	City's Exh. F-1.....	1.084	1.063

From the above it will be seen that there are certain differences. The principal differences will be stated in parallel columns and then discussed.

	<i>City</i>	<i>Company</i>	<i>Difference</i>
Gas oil	\$.220	\$.800	\$.080
Unaccounted for gas.....	.065	.078	.013
General expenses .....	.086	.104	.018
Amortization (depreciation) .....	.057	.090	.023
Other operating expense items.....	.405	.425	.020
Total operating expenses.....	\$.833	\$.987	\$.154
Taxes .....	.055	.073	.018
Uncollectible bills .....	.005	.003	.002
Total revenue deductions.....	\$.803	\$ 1.063	\$.170
Less:			
Offsetting incidental revenue.....	.030	.....	.030
"Utica differential" .....	.030	.....	.030
Cost of gas, city of Utica.....	\$.833	\$ 1.063	\$.230

Gas Oil. Assuming 3.5 gallons of gas oil per M c. f. of water gas made, the city claims that a contract which the company has for gas oil at a price of 6.2 cents a gallon fixes the cost at 22 cents per M c. f. The company's contract gives it a right to 1,700,000 gallons, 10 per cent more or less, at 6.2 cents a gallon. Deliveries under this contract were to begin in October, 1919, and the contract ends July 1, 1920. The total consumption of gas oil in 1918 was 2,787,000 gallons; in 1919 it was 2,630,725. The average price of gas oil to the company as shown by its annual report for 1919 was 8.50 cents per gallon; in 1918 it was 9.55 cents. It would therefore seem that the city's price, based upon a contract which will expire July 1, 1920, is low, particularly in view of the high prices for gas oil at present prevailing and with the prospect of considerable increases during the six months following July 1st. An average cost of 30 cents per M c. f., as shown by the company's report for 1919, will not be too high a figure and may not be high enough.

Unaccounted for Gas. The city claims this item should be allowed at 6.5 cents per M c. f.; the company's claim is 7.7 cents. The company's 1919 report shows that in actual experience during that year it amounted to 7.8 cents. The following tabulation showing the unaccounted for gas of

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several companies indicates that while this company's percentage is high it is not excessive when reduced to the basis of miles of 3-inch main and then compared with some of the other companies.

UNACCOUNTED FOR GAS

Compiled from the annual reports filed with the Commission for the year 1918.

Table 1

Company	Miles of main	Gas made, cu.ft.	Unacct. for, per cent	Unacct. for, per mile of main, cu.ft.	Unacct. for, per mile 3'-main, cu.ft.
Syracuse.....	248	1,264,328,000	8.63	441,090	274,580
Rochester.....	513	2,591,772,000	2.78	140,413	74,859
Westchester.....	579	2,361,148,000	12.13	494,656	254,658
Albany.....	152	761,087,000	11.72	586,723	296,059
Utica.....	221	744,664,000	12.80	431,883	250,723

Table 2

Company	Gas sold, cu.ft.	Gas sold, per mile of main, cu.ft.	Gas sold, per mile of 3'-main, cu.ft.
Syracuse.....	1,154,224,000	4,662,210	2,902,250
Rochester.....	2,512,737,000	4,893,350	2,608,740
Westchester.....	2,065,264,900	3,564,060	1,834,130
Albany.....	670,369,000	4,410,320	2,225,440
Utica.....	646,516,000	2,930,720	1,700,910

It is to be expected there would be some higher percentage of unaccounted for gas because of the high pressure transmission line from Utica to the Herkimer district. However, as the "Utica differential" of 3 cents claimed by the city has been accepted as part of the cost per M c. f., it will be fair to allow as part of this 3 cents differential the unaccounted for gas due to transmission through the high pressure line. It might be urged with some force that the percentage for unaccounted for gas is still too high, even with the above allowance, but it is not necessary at this time and in this case to reach a further refinement on this point.

General Expenses. These expenses, excluding amortization, per M c. f. sold, are high as compared with other companies of similar size and character. The 1919 figures are high compared with those for 1918. For the purposes of this case, the city's figures of 8.6 cents per M c. f. are accepted.

Amortization. The company's charge under this item for 1919 is \$52,285. This is about 2.25 per cent of the approximate cost of depreciable property and does not seem to be unreasonable. This percentage is equivalent to 8 cents per M c. f.

Other Items of Operating Expense. The differences, other than those above discussed, between the city's and the company's figures amount to 2 cents per thousand cubic feet. In view of the upward tendency of all prices, that amount may be allowed to stand.

Taxes. The company claims 7.3 cents per M c. f. for this item; the city, 5.5 cents per M c. f. An expert witness for the city testified that the special franchise tax in the city of Utica for 1919 was \$70,922. By using net earnings as a basis of calculation, he allocated to the gas department in Utica the sum of \$4352. The method seems faulty and the result inequitable. Apparently the city's estimate of 5.5 cents per M c. f. tax cost does not agree with such an allocation.

The total taxes of the company, except Federal income tax, for 1919, amounted to \$182,000, covering both departments and all districts. Applying to the total gas used in Utica (457,230 M c. f.), the city's rate of 5.5 cents produces \$25,148 as the share of the Utica gas department. Applying the company's rate of 7.3 cents produces \$33,378. There being no sufficient allocation of property, revenues, and expenses as between gas and electric departments, and between the various districts in each department, it is not possible to fix a definite M c. f. tax cost. Considering the evidence at hand, and in view of the final cost figures arrived at herein, the company's claim of 7.3 cents per M c. f. tax cost can be accepted. The difference between 5.5 cents and 7.3 cents would not change the result.

Offsetting Incidental Revenue. The city claims there should be an allowance of 3 cents per M c. f. to cover "miscellaneous revenue, forfeited discounts, minimum bills, etc."

In 1919, gas jobbing and merchandise revenue amounted to 2 cents per M c. f. sold. This should be allowed. Revenue from forfeited discounts and minimum bills appears in the average revenue which was estimated on a \$1.15 rate, as 1.5 cents in addition to the rate.

The average revenue per M c. f. in 1919, in Utica, on a rate of \$1 per M c. f., was \$1.0129. This figure is furnished by Mr. McSorley, secretary of the Utica company, and while it is not in evidence as the Utica earnings are not segregated in the 1919 report and therefore can not be made the basis of a finding, it does in fact constitute a reasonably accurate check.

The "Utica Differential". This allowance of 3 cents per M c. f. in favor of the city of Utica is made by the city's expert. It is clear that the transmission cost from Utica to the Herkimer district ought not to be charged against Utica, and it is also clear that the distribution cost per M c. f. is less in the more thickly settled Utica than in the outside territory. The fact that the company charges a higher rate in Herkimer than in the Utica district indicates that the company itself recognizes some sort of a differential. The city's claim of 3 cents is accepted, but no determination is made that such a figure is the actual differential.

The reasonable cost of gas may now be summarized as follows:

Company's figures based on 1919 experience.....	\$1.063
Less:	
Excessive general expense claimed by city.....	\$0.018
Offsetting incidental revenues.....	.020
"Utica differential" .....	.030
	<u>.068</u>
	\$0.995

If the foregoing is reasonably accurate, the determination of the value of the gas property in use in the public service in the city of Utica is not necessary at this time. If the rate base claimed by the city [\$1,153,500] is used in calculating a return of 8 per cent, the company would be entitled to \$92,280 as a fair return on the value of the gas property used by the company in the public service in the city of

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Utica. This is equivalent, on the basis of the 1919 sales, to 20.2 cents per M c. f. Adding this to the 99.5 cents above found as a reasonable cost of gas, gives \$1.197.

A net rate of \$1.15 per M c. f., plus 1.5 cents for forfeited discounts, minimum bills, etc., would produce an average revenue of \$1.165 per M c. f.

It would seem therefore that a price of gas in Utica of \$1.15 net per M c. f. is not above a reasonable price. However, as present costs are so high it seems best not to fix a rate in this case for the usual period of three years, but for a period of one year and until the further order of the Commission.

An order should be made permitting the company to file, on ten days' notice, the following block meter schedule of rates based on a net price of \$1.15 per M c. f., effective April 15, 1920:

Block Meter Rate:		
First	25,000 cu.ft.	per month, \$1.25 per M cu.ft.
Next	25,000 cu.ft.	per month, \$1.15 per M cu.ft.
Next	50,000 cu.ft.	per month, \$1.05 per M cu.ft.
Next	150,000 cu.ft.	per month, \$1.00 per M cu.ft.
Next	250,000 cu.ft.	per month, \$0.90 per M cu.ft.
All over	500,000 cu.ft.	per month, \$0.85 per M cu.ft.
Prompt payment discount, 10 cents per M c.f.		
Minimum charge, 50 cents per month.		

The rates in such schedule, other than the base rate of \$1.15 per M c. f., to be subject to complaint and determination thereof in the usual manner.

As the cost of furnishing gas to that portion of the Utica district which lies outside the city of Utica is certainly not less than within the city, the rate herein allowed should apply to the Utica district. The localities in the Utica district, except the city of Utica, having taken no part in this rate contest, the schedule of rates should be put into effect in such localities on statutory notice.

All concur.

In the Matter of the Equipment and Service Furnished by
the NEW YORK STATE RAILWAYS in the city of Rochester,
New York. [Case No. 7340.]

The constitutional protection to public service corporations extends not alone to a preservation of the title to their properties but to the right to receive just compensation for the service given to the public.

Service and rates for service have a very close and important relation to each other; service may not be ordered which does not take into consideration the amount which a public service corporation may demand for such service, and a just balance must at all times be maintained between the rights of the public and the rights of the corporation.

An attempt upon the part of a state commission to exercise its powers of regulation in such an arbitrary and unreasonable manner as to prevent a street railway company from obtaining a fair return upon its property used in the public service is repugnant to due process of law and void under the Fourteenth Amendment to the Constitution of the United States.

Decided April 15, 1920.

Appearances:

Messrs. Harris, Beach, Harris & Matson, attorneys for the New York State Railways.

Charles L. Pierce, Esq., Corporation Counsel, for the City of Rochester.

BARHITE, Commissioner:

This is a proceeding instituted by an order to show cause issued by the Public Service Commission against the New York State Railways, not as the result of a complaint but upon its own motion, for the purpose of determining whether the said company is furnishing safe, proper, and adequate equipment and service within the city of Rochester, New York, and whether orders heretofore made by the Commission with regard to said equipment and service have been obeyed.

The answer of the company admits that the service rendered is not reasonably adequate to supply the demands of

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the riding public, but alleges that the cost of the service is greater than its revenue, and that it is unable to furnish better service because it is limited to a five cent fare, under the provisions of a contract made between a predecessor of the company and the city, and that by a decision of the Court of Appeals in *Quinby vs. Public Service Commission*, 223 N. Y. 244, this Commission has no power to increase the fare by reason of said contract; that said power rests solely with the Common Council of the City of Rochester; that repeated requests have been made to the Common Council and other authorities of the city for permission to charge a greater fare than five cents, which have at all times been denied. It is further alleged that if the company is compelled to increase its service without an increase of fare sufficient to pay for such service, bankruptcy will be inevitable. Briefly stated, the claim of the company is that it is furnishing the best service possible with a five cent fare, and that if it is compelled to furnish better service without an increase in income, bankruptcy will be the only result.

The company further alleges that this Commission has no authority under the law to order changes or additions to the service while it has no power to increase the fare to a point which will pay for such additions and changes and a reasonable return upon the value of the property used in its business, and that if the law gives such power to the Commission, then that law permits the taking of the company's property without compensation and without due process of law, and deprives the company of the equal protection of the law, and is contrary to the Constitutions of the State of New York and of the United States, and is confiscatory and void.

The company further claims that in making a determination whether increased service should be required in the city of Rochester for the present rate of fare, the Commission should include as part of the city system the suburban lines extending from the city to the shores of Lake Ontario. These suburban lines are commonly known as the Charlotte line,

the Summerville line, the Sea Breeze line, and the Glen Haven line. It may be said that the Charlotte line is entirely within the city boundaries, and the city conceded upon the hearing that it should be considered as part of the city system. This concession was very properly made and renders unnecessary any discussion of that particular branch of the subject.

Upon the hearing, both the railroad company and the city were given full opportunity to present any evidence which to either of them seemed pertinent to the inquiry.

While the question whether the railroad company has disobeyed any orders of the Commission hitherto made with regard to service is not relevant to the real purpose of this proceeding, the Commission was desirous of ascertaining whether such a contention could be maintained. Within the past three years only two orders relating to street railroad service in Rochester have been made. One directed a re-routing of the so called Monroe Avenue line. This order has been obeyed. The other order was made February 19, 1919, and directed the company to add to its non-rush hour service.

The president of the company, under oath, was asked whether this latter order had been obeyed. He answered to the effect that it had been completely obeyed until the 16th day of January last, when, on account of the fact that one hundred or one hundred and twenty-five of the company's men were sick and the necessity existed of manning the snow fighting equipment, the order had not been completely obeyed. No evidence has been produced to show that the statement of the president is not correct, and the Commission has no knowledge of any fact which would tend to disprove his testimony. The failure of the company to maintain its schedule under an emergency situation needs no further comment.

Has the Commission the power to order changes and additions to the service or equipment of the company in the city of Rochester while it has not the power to increase the rate

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of fare to the extent necessary to yield the required expenses and a reasonable average return upon the value of the property actually used in the public service, and would such an order be confiscatory and void and in contravention of the Constitutions of the State of New York and of the United States?

It may be proper at this time to call attention to the fare question and the question of service within the city of Rochester as they appear from the records in the files of the Commission.

On the 25th day of February, 1890, the Rochester City and Brighton Railroad Company, one of the predecessors in interest of the New York State Railways, entered into a contract with the City of Rochester wherein and whereby the railroad company, among other things, agreed that from and after the 1st day of November, 1892, the said company, its successors and assigns, would, during its or their corporate existence, charge no passenger more than five cents for one continuous ride from any point on its route or any route or branch operated by it, or under its control, to any other point thereof, or any other connecting branch thereof, within the limits of the city of Rochester. This agreement was the result of an application made by the said railroad company to the City of Rochester for permission to change its motive power from horses to electricity.

By this agreement the company agreed to comply with all ordinances and resolutions of the Common Council which had been or might at any time thereafter be passed relating to the rate of speed, manner of running cars, general government or use of the tracks, removal of ice, snow, or dirt, and the general repairs of the streets within and for two feet outside of and adjoining the company's branch or tracks. It was also further provided in the agreement that before the same should become operative the company should deliver to and leave with the city a written agreement to accept and comply with all the provisions contained in the contract,

and to comply with all ordinances and resolutions of the Common Council of said city which may have been or at any time thereafter might be passed relating to the matters above stated.

Thereafter and on the 26th day of December, 1894, the Common Council passed a resolution which, among other things, provided that the cars of every street railroad then or thereafter constructed should run as often as once in every fifteen minutes between the hours of 6 o'clock in the morning and 12 o'clock at night.

In the year 1917 the New York State Railways made application to this Commission for an increase in fare. This application was opposed by the City of Rochester upon the ground that under the contract, to which attention has been called, the railroad company was obligated to furnish service within the city of Rochester for a five cent fare, and that this Commission had no power to increase the rate above the contract price.

The Court of Appeals in the matter of *Quinby vs. Public Service Commission, Second District*, 223 N. Y. 244, after a discussion of the subject, denied the right of this Commission to increase the rate of fare in the face of the contract, to which attention has been called.

This decision of the highest court in the State did not pass upon the question as to whether the railroad company had power to make the contract in question, or as to whether the said rate named in the said contract was confiscatory, but based its findings solely upon the construction of the law which gives the Public Service Commission power to pass upon and fix the rates of public service corporations, and held that in the case of a railroad company where the rates have been agreed upon between the company and the municipality in which it operates, by contract, that the Public Service Commission has no authority, under the statute from which it derives its powers, to raise the rate of fare in the existing contract.

The court declined to pass upon the question as to whether the State may not under its police power raise the rate in spite of the contract, if the situation warrants such action, although the railroad company has previously agreed to furnish service for a lesser rate.

In view of the fact that the Court of Appeals did not pass upon the very important question to which attention has been called, no good purpose will be subserved at this time to discuss the matter, but it is very important to determine whether the Public Service Commission, not having the power to increase the rate of fare, can or should increase the service where such increase of service will require an income in excess of that produced by the agreed rate of fare. At the beginning it will be useful to call attention to the law and to the universal opinion of the courts as to what income public service corporations are entitled as a matter of right.

The statute of the State of New York which provides for fixing rates for street railway companies directs this Commission in fixing such rates to do so "with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservations out of income for surplus and contingencies". (Public Service Commissions Law, Article III, Sec. 49.)

In *Municipal Gas Company vs. Public Service Commission*, 225 N. Y. 89, the court, in speaking of a gas rate fixed by statute, says: "There is no denial that the rates of public service corporations ought not to be so reduced by statute as to preclude a fair return, and that reduction below this is confiscation."

In *Smyth vs. Ames*, 169 U. S. 466, the court, after discussing the reciprocal rights of railroads and the public, says: "The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the service rendered by it."

The rights of a company to a return are well stated in *New Memphis Gas Light Company vs. New Memphis*, 72 Fed. 952: "The company has a right to such gross revenue from the sale of gas as will enable it to pay all legitimate operating expenses, pay interest on valid fixed charges, so far as bonds or securities represent an expenditure actually made in good faith, and also to pay a reasonable dividend on stock, so far as this represents an actual investment in the enterprise."

In the *Minnesota Rate Cases*, 230 U. S. 352-434, Justice Hughes holds that the constitutional protection to the companies extends not alone to the title to their properties, but to the right to receive just compensation for the service given to the public.

If it be contended that if a rate when fixed is fair and reasonable, that such rate is good for all time does not follow.

In *Municipal Gas Company vs. Public Service Commission*, 225 N. Y. 89, the facts appeared that in 1907 the Legislature passed a law which fixed the price for illuminating gas in the city of Albany. For many years the statutory rate was not exceeded, but a time came when the company claimed that the statutory rate was confiscatory and action was brought against the Public Service Commission, the City of Albany, and others, for an injunction restraining the defendants from compelling the company to abide by the statutory rate. The court held that rates for public service corporations ought not to be so reduced by statute as to preclude a fair return, and that reduction below this is confiscation. The court further held that the argument that a statute is either valid or invalid at the moment of its making and from that premise the conclusion is supposed to follow that there is a remedy for present confiscation but none for confiscation that results from changed conditions, is too narrow a view to take of the protection of the Constitution. That a statute prescribing rates is one of continuing operation. That it is an attempt by the Legislature to predict for future years the charges that will yield a fair return. The

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prediction must square with the facts or be cast aside as worthless.

The same principle is laid down in *Missouri vs. C., B. & Q. R. R.*, 241 U. S. 533, at page 539.

The case of the *Mississippi Railroad Commission vs. Mobile and Ohio Railroad Company*, 244 U. S. 388, is a case directly in point. In that case the Mississippi Railroad Commission required the railroad company to add to its service six passenger trains. Objection was made to this order on the ground that the depression of business incident to the European war had so reduced its income that the income was less than its current expenses and that a large loss would be incurred in operating each of the six trains.

The Supreme Court of the United States, in affirming an injunction issued against the railroad commission restraining the commission from enforcing its order, laid down the following principles of law, namely:

While the power of the States over the railways within their borders is very great and comprehensive, the property of the railways is nevertheless protected by the fundamental guaranties of the Constitution, is entitled to as full protection as any other private property devoted to a public use, and can not be taken from its owners without just compensation or without due process of law.

An attempt upon the part of a state commission to exercise the power of regulation in such an arbitrary and unreasonable manner as to prevent a railroad company from obtaining a fair return upon its property invested in the public service is repugnant to due process of law and void under the Fourteenth Amendment.

Upon the facts of this case, *held* that an order of the Mississippi Railroad Commission, requiring the appellee company to restore certain passenger trains to service on its line within that State, was arbitrary, unreasonable, in excess of the lawful powers of the commission, and void under the due process clause of the Fourteenth Amendment.

The reasonableness of requiring a carrier to operate specified trains can not be made to depend upon the relation of the money return to the "out-of-pocket" cost, *i. e.* immediate outlay for wages and fuel, involved in their operation. (*Northern Pacific Ry. Co. vs. North Dakota*, 236 U. S. 585.)

The above cases are cited to show that the company's claim to a sufficient income to pay its necessary expenses and a fair return upon its property is based upon a right guaranteed to it by the Constitution of the United States. Cases to the same effect might be cited without number; in fact, no authorities holding a contrary opinion can be found.

It is true that the decisions of the courts to which we have called attention were dealing with cases where the rates of fare were fixed by statute, while in the case of the New York State Railways the rates within the city of Rochester are fixed by agreement between the city and the railroad company, but it can not be said that this distinction takes away from the company the protection of the United States Constitution which is the supreme authority in the land.

Even if it should be argued that section 18, Article III of the New York State Constitution, which is the source of the authority behind the contract between the city and the railroad company, takes away the protection guaranteed by the United States Constitution, then the only result would be that that particular section of the State Constitution to which reference is made is itself unconstitutional in that it takes away the protection afforded by its superior instrument, the Constitution of the United States. (Article VI, Sec. 2, Constitution of the United States.)

It must be conceded that there are decisions of the Supreme Court of the United States which upon cursory reading seem to be authority for the contention that a contract between a city and a street railroad can not be overturned and must remain in force, no matter how disastrous the result may be to the property of the company. The cases to which we refer are *Cleveland vs. Cleveland City Railway Co.*, 194 U. S. 517; *Detroit United Railway vs. Michigan*, 242 U. S. 238; *Columbus Railway, Power and Light Co. vs. City of Columbus*, 249 U. S. 399.

In each of the above cases rates of fare made by contract between a municipality and a street railroad were under dis-

cussion, and the court sustained the contracts as binding. But in the cases noted the point considered by the Supreme Court was whether the rate of fare named in the contract could be changed by one of the parties to the contract without the consent of the other, and the court held that it could not; that as between the city and the railroad company the contract was valid and binding.

But the question was not presented and was not discussed by the court as to the right of the State under its police powers to disregard the rate named in the contract if from changed conditions it should appear that the contract rate is not sufficient to pay the expenses of the road and a fair return upon the property invested, and is confiscatory. Light upon what the decision of the court would have been if the powers of the State to disregard the contract rate had been under discussion may be found by a consideration of the views of the United States Supreme Court in *Union Dry Goods Company vs. Georgia Public Service Corporation*, decided in January, 1919, 248 U. S. 372.

In the case above cited an electric light and power company and a dry goods company had entered into a contract by which the electric light company agreed to furnish the dry goods company with light and power at a stipulated rate. The contract was performed for nearly two years when a bill was presented to the dry goods company at a higher rate than that named in the contract. It appeared that the new rate was authorized by an order of the Railroad Commission of Georgia, after investigation and hearing. The question as to whether the State had the right to override the provisions of the contract and ignore them was squarely presented. The Supreme Court held that the State had such right. The court, in the course of its opinion, says: "It will be seen that the case of the plaintiff in error is narrowed to the claim that reasonable rates, fixed by the State in an appropriate exercise of its police powers, are invalid for the reason that if given effect they will supersede the rates desig-

nated in the private contract between the parties to the suit, entered into prior to the making of the order by the railroad commission. Except for the seriousness with which this claim has been asserted and is now pursued into this court, the law with respect to it would be regarded as so settled as not to merit further discussion." "That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court."

The court, in quoting from one of its own decisions, further says: "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the States from properly exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected."

If attention is called to the fact that the contract under discussion in the last case cited was between a public utility company and a private company, the answer is that no rule of law exists which makes a contract between a municipality and a public utility more sacred and less subject to the constitutional provision that property must not be confiscated, than a contract between private parties.

The Municipal Gas Company of Albany filed its petition with this Commission asking that a rate be fixed in excess of that provided by statute, upon the ground that the statutory rate fixed by chapter 223 of the laws of 1907 was insufficient under the present costs of manufacture to yield a proper return and that under other statutes it might be compelled to manufacture and distribute gas, and that a continuation of its business under the statutory rate would result in taking the company's property without just compensation. The Commission denied the petition upon the ground that it had no authority to supersede the rate fixed by law. The determination of the Commission was affirmed by the Court of

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Appeals, 224 U. S. 156. Thereafter the gas company brought its action in the Supreme Court as hereinbefore stated [225 N. Y. 89], and the court held that the action would lie and that the defendant would be restrained from compelling the company to adhere to the statutory rates if it could be shown that those rates were at the time confiscatory. It is unnecessary to pursue this branch of the subject further. Enough has been cited to show that a public service corporation not only has the right, under the provisions of the United States Constitution, to a return for its services which will provide adequate and lawful income, but that such right will be recognized and protected when relief is sought in the proper tribunal.

In view of the legal right which the New York State Railways has to demand a proper compensation for its services, what order should this Commission make with regard to service if it appears that its present rate of fare will not furnish such service? If this Commission had the power to grant a sufficient rate to furnish proper and adequate service, the answer would be simple.

Can or should this Commission attempt to compel the railway company to furnish service which must eventually lead to bankruptcy? Would such a course be in the interest of the public? Certainly not. And the decisions of the courts forbid such an attempt.

The Public Service Commissions Law embodies a purpose to put all companies whose duty requires them to serve the public, under the control and direction of the State, and provision is made not alone to protect the public but also the companies themselves. The Public Service Commission is constituted for the purpose of carrying out the provisions of the statute. It is given authority to compel the companies under its jurisdiction to furnish such service as will properly meet the needs of the people, and at the same time to provide such income as will protect a company in its constitutional rights and will enable it to perform its legal duty to the

public. In the case of the New York State Railways, the Commission, if we follow the mere words of the statute, is given authority to compel full and adequate service in the city of Rochester, but, under the decision of the Court of Appeals, has no power to grant such rate of fare as will enable the company to furnish such service. Was it the intention of the Legislature when it enacted the Public Service Commissions Law to give to any department of the state government the power to wreck business enterprises in the State? It was the intention to promote fairness and justice; to preserve the rights of both parties to any controversy which might arise. Any other construction would be absurd, and would violate well established rules for the interpretation of the statutes.

In *Hayden vs. Pierce*, 144 N. Y. 512, at page 516, the court says: "It is a familiar rule that a construction of a statute is to be avoided which is liable to produce a public mischief or to promote injustice. Language, however strong, must yield to whatever appears to be the intention, and that is to be found not in the words of the particular section alone, but by comparing it with other parts or provisions of the general scheme of which it is a part."

In *Blaschko vs. Wurster*, 155 N. Y. 437, these words are found: "The courts will consider the mischief which the statute was aimed at, and in order to give it effect words absolute in themselves, and language the most broad and comprehensive may be qualified and restricted by other parts of the same statute or by the facts and circumstances to which they relate."

O'Grady vs. Live Stock Ins. Co., 16 A. D. 567, lays down this doctrine: "It is a canon of statutory interpretation that the courts should avoid such a construction as will lead to absurdity or manifest injustice."

The case of the *State ex rel. Missouri Southern Railroad vs. Public Service Commission of Missouri*, 259 Mo. 704, is especially pertinent. The Missouri Public Service Commissions Law is copied almost verbatim from the New York

statute, and an interpretation of the Missouri statute is an interpretation of the New York statute. In the case cited the railroad company asked the public service commission to allow it a greater fare than that prescribed by the statute. The commission held that it had no power to override the statutory rate. The court discusses the extent and the meaning and the effect of the public service commissions law in no uncertain terms. The court also discusses the wide scope of the act and calls attention to the fact that it was intended by the legislature to give the public utilities commission power over the whole subject — rates and service — that both must hang together, and that power over either rates or service can not be exercised without power over both. The court says:

It is apparent from the outline of the utilities act given in paragraph two that it is a radical departure from the policy of former statutes. We need not go into details, for the thing speaks for itself. Whatever may be the case in other particulars, it, subject to constitutional provisions, occupies the entire field on given phases relating to rates and service. This becomes clear either from a study of the language of section 47 or by getting at the meaning of that section from the broad scope, the philosophy and intentment of the whole act.

Take the latter proposition first. A court will expect to find in a rounded out utilities act, made by a just and intelligent lawmaker, as here, that such act approaches the subject matter of service and rates from several angles. It would expect to find that the act justifies its existence by impliedly, at least, recognizing that the utility with the public is vitally interested in service and rates; next that controversies and frictions might exist (or would be expected to spring up on that score) detrimental to both; next that the statutory scheme theretofore existing, if any, not only for settlement of those controversies but for the protection of the owner of the utility as well as of the public in the matter of service and rates, had become antiquated or inadequate. Such court would expect to find that the act runs on the theory that the corporation, in order to spend, must be allowed to gather — that (if we may be allowed a homely figure) the intake bung-hole in the corporate barrel would be open simultaneously with the outgo spigot. Without being driven to it, willy nilly, no court would expect to find in such act the pestiferous idea crystallized into law that the solicitude of the lawmaker was exhausted, or stopped short,

at prescribing a multitude of onerous duties and a multitude of substantial outlays for the corporation. *Contra*, it would expect to find a corresponding legislative solicitude in the line of providing the ways and means essential to carrying out the orders of the commission on safe and adequate service. Moreover, such court would expect to find evidence in such utilities act that the lawmaker knew a corporate money chest did not replenish itself in some miraculous way, like the widow's cruse of oil, for instance; knew that funds for safe and adequate service must directly or indirectly, sooner or later, spring from freight rates and passenger fares. Otherwise, the utility corporation would be headed by the act itself toward death through starvation—an absurd and unthinkable hypothesis.

In that view of it a court must naturally expect the lawmaker would provide a plan for corporate income out of which it must eventually not only get returns on its investment but meet the outlays the act contemplated the commission might or would exact.

And again the court, in speaking of the purposes of the act, says: "In fine, it gave the commission plenary power to coerce a public utility corporation into a safe and adequate service and the performance of the public duty unto which its franchise bound it. On the other hand, the act does not contemplate a confiscation of corporate property, and we include in the term 'property' the right to earn a reasonable return on its investment. Looking to that end, the act undertakes to balance outgo with income. It covers that field."

And again, "We take it that a decent respect for the legislature precludes the theory that the commission was given control of expenditures and denied control of income, the two being inseparable in the very nature of things. Moreover, it precludes the theory that the commission was given power to ascertain a just rate and then, wonderful to relate, was denied power to enforce it; that prior legislation controlled the rate, while the commission controlled the outgo, thereby providing an upper and nether millstone with the corporation between."

What could be more descriptive of the case before us? Under the decision of the Court of Appeals, this Commission

has no power over street car rates in the city of Rochester; and yet, if we are to construe the statute that it has power over the service, in the words of the Supreme Court of Missouri, we have a situation which provides "an upper and a nether millstone with the corporation between".

If to require the New York State Railways to furnish a proper and adequate service in Rochester at the present rate of fare prevents the company from obtaining a reasonable return for the services rendered, this Commission has no power to order such service.

In *Missouri Pacific Railway Co. vs. Tucker*, 230 U. S. 34, the court says: "To require a railroad company to charge such rates for transportation as to prevent it from obtaining a reasonable return for the service rendered, amounts to deprivation of property without due process of law in violation of the Fourteenth Amendment, and is beyond the power of the State."

In *Atlantic Coast Line Railroad Company vs. North Carolina Corporation Commission*, 206 U. S. 1, at pages 19 and 20, may be found a statement of the principle to which attention has been called. In the language of the Supreme Court, "The elementary proposition that railroads from the public nature of the business by them carried on, and the interest which the public have in their operation, are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies, endowed with power to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine. Accepting this general rule, the assignments of error rest upon the hypothesis that the order which the court below enforced was so arbitrary and unreasonable in its character as to transcend the limits of regulation and to be in effect a denial of due process of law or a deprivation of the equal protection of the laws. As the public power to regulate railways and the private right of ownership of such property coexist and do not

the one destroy the other, it has been settled that the right of ownership of railway property, like other property rights, finds protection in constitutional guaranties, and, therefore, whenever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation but an infringement upon the right of ownership, such an exertion of power is void, because repugnant to the due process and equal protection clauses of the Fourteenth Amendment."

In *Brooks-Scanlon vs. The Railroad Commission of Louisiana*, Supreme Court Reporter, Vol. 40, No. 8, page 183, decided February 2, 1920, we find this principle laid down: "A company can not be compelled to operate its railroad when it can not do so without loss therefrom, though its other business of lumbering be sufficiently remunerative to absorb the loss and make returns on its entire business. If a company operating a lumber business and a railroad be taken to have granted to the public an interest in the use of the railroad, it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss."

It will be noticed that the decisions to which attention has been called are outside of and apart from the very serious question whether a public utility company incorporated for the very purpose of serving the public has the power deliberately to make a contract which in the future may prevent it from fulfilling the purpose of its incorporation. Individuals and corporations may waive any statutory or constitutional right, but only when private interests are involved.

Phyfe vs. Eimer, 45 N. Y. 102.

Sentennis vs. Laclew, 140 N. Y. 463, at page 466.

Certainly the rate of fare which will enable a company to give proper service to its patrons is a matter in which the public is deeply interested and concerns its interests. The question to which reference is made has never, so far as my investigations throw any light upon the subject, been squarely presented to any court, although in the case of *Thomas vs.*

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West Jersey Railroad Co., 101 U. S. 71, the Supreme Court lays down the doctrine that where any corporation like a railroad company has granted to it by charter a franchise intended in a large measure to be exercised for the public good, any contract which disables the corporation from performing those functions is a violation of the contract with the State and is void as against public policy. But this Commission has no power to interfere with the contract between the city and the company and must treat it as valid, and the subject is only mentioned as one involved in the matter under discussion and to call attention to the fact that the contract is valid so far as this proceeding is concerned.

That the Commission *should not* direct additional service in the city of Rochester if the income of the railway company is not sufficient to pay for such service, is abundantly illustrated by the action of the courts in similar cases.

In the *State ex rel. Attorney General vs. D. C. M. & T. Ry. Co.*, 53 Kan. 329, the court held that where a railroad can not be operated except at a great loss by any corporation or person, not taking into account the repairs of the road and the taxes thereon, the supreme court having some discretion in the granting of a writ of mandamus, will not compel by a peremptory writ the railway company to replace or put into repair its tracks, a part of which has been torn up, as such an order would be useless or futile and of no public benefit.

In Wyman on Public Service Corporations, section 301, the author states that while failure to perform its full duty may make a company liable to forfeiture of its charter, the court will not by mandamus, when actual insolvency appears, make a useless order.

In *People ex rel. Green vs. D. & C. R. R. Co.*, 58 N. Y. 152, at page 163, it is said that the court will not by its writ of mandamus command a defendant to perform an impossibility.

In the *City of Benton Harbor vs. The St. Joseph & Ben-*

ton Harbor Street Railway Co., 102 Michigan 386, it is held that mandamus will not lie to compel a street railway company to comply with the provisions of an ordinance requiring it to pave the street between its rails when it appears that owing to the financial straits in which it is placed it is impossible for its officers to borrow or otherwise raise the money to pay for such paving.

An English court, in the matter of the *Bristol and North Somerset Railway Company*, L. R. 3 Queen's Bench 10, refused to order a railroad company to build a bridge which it had lawfully been ordered to build, upon the ground that the company was financially unable so to do. The court said: "To enforce by mandamus an order which imposes on a virtually defunct company a duty which it is impossible for it to discharge, would be contrary to the elementary principles of justice."

Attention should also be called to the terms of the contract between the city and the railway company. That contract, as hereinbefore mentioned, provides that only a five cent fare shall be charged within the city of Rochester from and after the 1st day of November, 1892, and that the railway company would at any and all times comply with all the ordinances of the Common Council which had been heretofore or might thereafter be passed. The Common Council did on the 26th day of December, 1894, pass an ordinance which provided that all street cars should be run as often as once in every fifteen minutes between 6 o'clock in the morning and 12 o'clock midnight; that ordinance, so far as appears, is still in force, and the schedule in evidence shows that the terms of the ordinance are now obeyed by the company. The city can not claim the benefit of a portion of the contract and repudiate the rest. If the city stands upon the five cent fare, it must also acknowledge the force of its ordinance which is a part of the contract and provides for a fifteen minute headway. *Petition of the N. Y., L. & W. R. Co.*, 98 N. Y. 447, in which the court says the rail-

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road can not claim the benefit of a part of the agreement and repudiate the rest. The provision for a five cent fare and the provision that cars must be run not more than fifteen minutes apart must be construed together.

It is very evident from the authorities to which attention has been called, that the New York State Railways has an absolute right to an income which will pay not alone its necessary expenses of operation and its proper fixed charges, but will produce a fund sufficient to provide a surplus for contingencies and a proper and reasonable return upon the value of the property used in its business. It is further apparent that if the present rate fixed by the contract is not sufficient to furnish the amount of money necessary to provide for the purposes to which attention has been called, that the State can not, and if it can, should not, attempt to force the company to perform services beyond its power. We do not mean to hold that the city must continue to receive insufficient service for all time and is without remedy or protection, but the remedy is one over which this Commission has no control and it is therefore unnecessary and improper to discuss it. Public service corporations are given great privileges, and on the other hand they are obligated to an extent commensurate to those privileges, and in this respect they differ from private corporations which are not formed for the purpose of serving the public and are not, therefore, given the prerogative of making demands upon the people.

What is the financial condition of the New York State Railways? Upon the hearing, certain of the railroad officials were called upon under oath to testify to the matters of income and disbursements, and other questions which would throw light upon that condition. The city was given full opportunity to cross-examine these officials and to offer such evidence upon the subjects under examination as it might consider proper. But the Commission, not content to rely

alone upon the testimony and the suggestions of the contending parties, has taken advantage of its own facilities, and for more than three weeks its experts have been engaged in an examination of the company's financial condition and the result of its operations. This work was done under the active and constant supervision of Mr. Charles R. Barnes, chief of the division of electric railroads, whose experience of twenty-five years in the service of the State in charge of railroads operated by animal power and later by electricity has given him a most complete knowledge of all questions which may arise in his department, and whose ability and fairness is recognized not only by the Commission but by all who are familiar with his work. His report has been made a part of this memorandum, that all who are interested may have complete knowledge of what has been done.

I shall content myself with calling attention to only a few matters contained in the report.

It appears that the actual deficit for the year 1919 in the city five cent zone amounts to \$643,171.86; the actual deficit for the suburban lines running to the lake for the same period amounts to \$80,443.45; the actual deficit arising from the operation of the Rochester lines which include the lines running to the lake and which are properly included, as we shall show, amounts to \$723,615.31. The estimated deficit for a future twelve months' period in the five cent zone amounts to \$835,974.78. This estimate includes a probable increase of 10 per cent in the amount of traffic due to improved service, and the estimated cost of that service.

It must be remembered that the estimate for the future twelve months' period does not include any increased pay for motormen and conductors. The contract between the company and the employees mentioned expires on the 1st day of May, 1920, and it is a matter of general knowledge, though not of strict evidence, that it is the intention of the men at the expiration of the contract to demand a very substantial

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increase in pay. If any increase is demanded and granted the aggregate must be added to the estimated deficit for the future twelve months' period.

It should also be remembered that an action is now pending in the Supreme Court, brought to test the propriety and the legality of a ten cent fare between any point in the city as it existed prior to the amendment to the charter in 1915, and that portion of the city formerly constituting the village of Charlotte. That action has terminated in a judgment declaring that a five cent fare over the territory named is confiscatory. The company has been allowed during the pendency of the action to charge ten cents fare, giving a rebate slip with each fare good for five cents if the judgment of the court is reversed upon the appeal now pending. Such a reversal would make the company liable to pay back, up to the present time, about \$223,000, and in addition, a reduction of the fare to five cents would further reduce the future income of the company.

In Mr. Barnes' report reference is made to the terms depreciation, deferred maintenance, and deferred replacements, and provision is made for these items. These are not merely terms based upon possible contingencies, but are as substantial and necessary for a proper statement of moneys that must be paid by the company as a provision for salaries and wages of employees. They must be kept in the accounts, not by the wish of the company but by the order of the Commission, for the benefit of the public. Otherwise, a statement of the company's transactions at the end of the year might show a substantial surplus which could properly be divided among the stockholders as dividends, or which would give the company unwarranted credit, while the real truth might be that the property of the company had lessened in value, had not been properly maintained, or replaced by new, and the traveling public might suffer thereby.

The suburban lines have been included in the statement,

although the results of the operation of these lines have been separated from the results in the five cent zone. Whether we take the five cent zone alone, or in connection with the suburban lines, each case results in a deficit; but the suburban lines should be considered in connection with the strictly city lines. The road extending to Summerville is used daily during the entire year by many people whose place of business is within the city. The highway through which its line passes is lined from the northern boundary of the city to the lake, with the residences of those who in reality are a part of the city business life. At the lake extremity of the line and for some distance back are scores of cottages, and in the summer time a tented city, practically all of which are the temporary homes from year to year of the citizens of Rochester. The Sea Breeze line extends from the northern boundary of the city to the lake and the mouth of Irondequoit Bay and reaches not alone a bathing beach and places of amusement, but numerous cottages and dwellings some of which are occupied during the entire year. This line also furnishes the only trolley by which to reach Durand Eastman Park, the largest and one of the most important, if not the most important, park belonging to the city, and too far away from the residential portion of the city to be reached except by some kind of conveyance. The Glen Haven line is a part of the trolley extending to Sodus Bay, some forty miles away from the city, but that portion which is considered in the financial results leads to Irondequoit Bay and serves many people whose daily life is connected with city affairs, and is a means of communication with resorts which during the Summer are visited by thousands of the residents of the city. It may be said, however, that if the Glen Haven line is not considered, no substantial difference would be found in the financial results.

If the above lines or any one of them were discontinued, the loss would be felt most severely by the inhabitants of the city of Rochester. Thousands would be prevented from

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reaching places of recreation and pleasure and many would be compelled to live or cease to do business in the city itself.

Many authorities might be cited in confirmation of these views. This Commission has placed itself on record in a case relating to the very road under consideration. In *Re New York State Railways*, P. U. R. 1919-A, at page 755, the Commission considered fares in Syracuse, Utica, and adjacent communities. After stating that it is not fair that one community should be compelled to pay for the service rendered to another, but that this rule should not be carried to an extreme, the opinion continues: "Neither is it possible to fix the limits by the geographical boundaries of the different municipalities. It is common knowledge that the actual limits of a community are not bounded by its geographical lines, and that in the case of all of our cities there is adjacent territory, peopled for the most part by those doing business in the city and all forming a part of one community. In such cases it may be fairly said that it is an impossibility in practical operation to separate the accounts to show accurately the revenue, the expenses of operation, or even the investment in property used in the service."

If it should be suggested that a statement of the entire business of the road would show a sufficient profit to enable the company to render adequate service in Rochester, the answer is, even without an examination of the total receipts and disbursements of the company, that the people of Syracuse and Utica have a well founded objection to pay for the operation of a railroad in Rochester, as the people of Rochester have a well founded objection to pay for service in the other cities named; and, further, the authorities do not warrant such a determination.

In the case of *Smyth vs. Ames*, *supra*, the facts are that the State of Nebraska fixed certain rates for freight carried by railroads within the State. The statute was attacked as unconstitutional, on the ground that the rates prescribed

were not reasonable compensation for the service rendered. One of the arguments on behalf of the State of Nebraska was to the effect that the reasonableness of the rates fixed by the statute was not to be determined by the effect of those rates alone, but that the court should take into account the whole business of the company.

The Supreme Court of the United States, in commenting upon this claim, said, at page 540:

It is further said, in behalf of the appellants, that the reasonableness of the rates established by the Nebraska statute is not to be determined by the inquiry whether such rates would leave a reasonable net profit from the local business affected thereby, but that the court should take into consideration, among other things, the whole business of the company, that is, all its business, passenger and freight, interstate and domestic. If it be found upon investigation that the profits derived by a railroad company from its interstate business alone are sufficient to cover operating expenses on its entire line, and also to meet interest, and justify a liberal dividend upon its stock, may the legislature prescribe rates for domestic business that would bring no reward and be less than the services rendered are reasonably worth? Or, must the rates for such transportation as begins and ends in the State be established with reference solely to the amount of business done by the carrier wholly within such State, to the cost of doing such local business, and to the fair value of the property used in conducting it, without taking into consideration the amount and cost of its interstate business, and the value of the property employed in it? If we do not misapprehend counsel, their argument leads to the conclusion that the State of Nebraska could legally require local freight business to be conducted even at an actual loss, if the company earned on its interstate business enough to give it just compensation in respect of its entire line and all its business, interstate and domestic. We can not concur in this view. In our judgment it must be held that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The State can not justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the State has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its inter-

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state business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the State that the State can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and without the State, can have no application where the State is without authority over rates on the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business.

In the case of the New York State Railways, this Commission has no power under the decision of the Court of Appeals in the *Quimby* case, to adjust rates over the entire line of that railway, and is in exactly the same position as the State of Nebraska under the facts in *Smyth vs. Ames*.

Furthermore, when it appears from the record that the deficit for operation in 1919, in the five cent zone in Rochester, was \$643,171.86, and on the suburban lines was \$80,443.45, and that the estimated deficit for a future twelve months' period with an increased proper service in the five cent zone would amount to \$835,974.78, can it be said, in the words of the Supreme Court of the United States, that the present fare in Rochester is just and reasonable?

In *San Diego Sand Company vs. National City*, 174 U. S. 739, the same principle as that stated above is enunciated.

It follows that the order to show cause should be vacated, and the case closed on the books of the Commission.

Hill, Chairman, concurs in the result proposed by Commissioner Barhite, not on the ground of lack of power, but because under the facts disclosed the making of an order requiring the large addition to the service which is found to be necessary, would in his opinion be an unreasonable and arbitrary exercise of the power possessed by the Com-

mission under subdivision 2 of section 49 of the Public Service Commissions Law

Van Namee, Commissioner, excused from voting.

IRVINE, *Commissioner*, concurring:

I concur in the conclusions reached by Commissioner Barhite but desire to state my individual views upon certain points involved in the case.

Were it not for the principle of law determined in the much discussed *Quinby* case, the power and the duty of the Commission would be equally clear. We should order the New York State Railways to make additions and improvements to its equipment, roadway, and service in such manner as to provide adequate and convenient facilities for all those having occasion to avail themselves of the service in the city of Rochester, and we should sustain, and if necessary fix, a rate of fare sufficient to compensate the company for the service so rendered: that is to say, a rate that would yield sufficient revenue to pay operating expenses and taxes and yield a reasonable return on the value of the property used in such service together with reasonable provision for surplus and contingencies. The rate of fare in Rochester is, however, restricted to five cents, and the evidence before the Commission establishes beyond a doubt that the revenue which may be earned at such a rate of fare is totally inadequate to permit the payment of operating expenses, taxes, and anything like a fair return upon the investment even under present conditions of service. It is highly probable that if additional service were to be required the revenue would be insufficient even to meet operating expenses.

The point decided in the *Quinby* case, and the only point actually decided, is that the Legislature has not conferred upon the Commission authority to permit rates of fare in excess of the existing restriction. For the purposes of this

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case it makes no difference whether that restriction is to be dealt with in terms of contract absolute, condition subsequent, or police regulation. Whatever be its legal designation, the Legislature has not conferred upon the Commission power to transcend the restriction.

The power of the Commission to require adequate service is that conferred by subdivision 2 of section 49 of the Public Service Commissions Law, and the precise question to be determined in this proceeding is whether it is the duty of the Commission under that subdivision to require additions and improvements to equipment and service although under present conditions the result of compliance with such an order would be to require the company to operate in Rochester at an actual loss or at best without more than a merely nominal return upon its investment.

In the opinion of Commissioner Kellogg it is urged, and with great force, that it is the duty of the Commission to require service adequate to the reasonable demands of the public regardless of revenues and return; that although the power to provide revenue has been denied to the Commission it must reside somewhere; and that the company should obtain relief through injunctive process in a court of equity as in the *Municipal Gas* case, 225 N. Y. 89, or, that remedy failing, go into bankruptcy. I can not concur in that view. If the question were solely one of providing revenue by an increase in fares, the *Quinby* case and the two *Municipal Gas* cases, 224 N. Y. 156, and 225 N. Y. 89, would be controlling. The logic, however, of the second *Municipal Gas* case cuts both ways. If a public service corporation may obtain an injunction to restrain the State, the Public Service Commission, and the City from enforcing a rate restriction because it operates to cause confiscation, it would seem clear that such a corporation might have like relief to restrain the Commission from enforcing an order for additional service which would produce the same result. The only reason occurring to the writer why such relief could not be had is

that there is an adequate remedy at law by certiorari from the Commission's order, but the remedy exists by certiorari only when the Commission has made an unlawful or unwarranted order. Therefore, if the order would be annulled on certiorari, the Commission should not make it in the first instance.

A case not to be ignored in the discussion is *Public Service Commission vs. International Railway Company*, 225 N. Y. 631. In that case the Commission applied for a mandamus to compel the International Railway Company to operate its cars. It had entirely ceased rendition of service because of a strike among its employees. The company answered that it was financially impossible to yield to the strikers' demands and so renew its service. As the case was presented on a motion for judgment this averment stood admitted, and the court held that this allegation of impossibility made an issue of fact because mandamus will not issue if obedience is impossible. The case presented the propriety of the remedy sought, and it throws no light on the question whether service could be compelled by other means if obedience to the process were possible but could be accomplished only by means amounting to the destruction of the company's property, either immediate or through the slower but just as certain method of absorbing capital in operating expenses.

Compliance with an order for additional equipment and service might be accomplished in one of several ways —

1. The company might borrow money from time to time to meet its deficits in operation without prospect of repayment: this would be difficult of accomplishment even if the Commission could under the law and would in its discretion authorize the issue of securities for such a purpose.

2. The company also operates the city systems in Syracuse, Utica, Rome, and Oneida, and certain interurban lines. If it has an income from such other operations, it might use it to pay the operating deficit in Rochester. The fares are already higher in Utica and in Syracuse than in Rochester,

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but aside from this it would be worse than unfair to require those using the systems in other cities and the interurban lines to contribute to the maintenance of the service in Rochester. The case is entirely different from that of different lines in the same community, where it is almost always true that certain lines or portions of lines are operated at a loss which is made up by the returns on other lines. While many persons may habitually use only the paying lines and others habitually use only the non-paying lines, the community is an entity. Its entire traveling needs must be subserved. The policy of our law is for a uniform rate, and it is impossible to adjust the fare for each passenger to the cost of the service he receives. When two or more communities are concerned this principle does not apply merely because the same corporation happens to operate in both or all. To use income from Syracuse, for example, to pay an operating deficit in Rochester would be to pauperize the citizens of Rochester at the unwilling expense of those of Syracuse.

3. It is possible that the company might surrender the franchises that are costing it so dear and cease service altogether. He would indeed be a rash man who would take the property and begin where this company leaves off. It is true the city may sometime obtain authority and may desire to venture upon the experiment of municipal ownership and operation, but in the meantime it would be without any service. It is certainly not within the province of the Commission to lend its aid in destroying what now exists.

It can not be questioned that the financial result of requiring additional service is a matter to be considered in determining the reasonableness of such requirement. (*Atlantic Coast Line vs. North Carolina Corporation Commission*, 206 U. S. 1; *Missouri Pacific Railway Company vs. Kansas*, 216 U. S. 262; *Miss. R. R. Com. vs. Mobile & Ohio R. R.*, 244 U. S. 388.) The Commission can not deal with a possibility that at the end of litigation in the remote future the

company may obtain financial relief. It must act upon the facts, and the rate restriction is at present as stubborn an obstacle as if it created a physical instead of a legal barrier. In no view of the case can I see that an order for additional service would be other than unreasonable and arbitrary as well as an unconstitutional exercise of power.

KELLOGG, *Commissioner*, dissenting:

In this case an order was, on the 10th day of February, 1920, issued by this Commission, directing the respondent, the New York State Railways, to show cause why it should not furnish safe, adequate, and proper equipment and service within the city of Rochester, and why orders heretofore made by this Commission with regard to said equipment service have not been obeyed.

The record shows that whatever failure there may have been in the strict compliance with the orders of this Commission was due to physical conditions over which the respondent had no control, and for which it was not responsible, and that such conditions have ceased and no longer interfere with the proper observance of the orders in question.

As to the adequacy of the service, however, a very different question arises. The answer of the respondent expressly admits "that the service rendered in the city of Rochester is not reasonably adequate to supply the demands of the riding public". This admission was reiterated frequently on the hearings, and there is no disposition on the part of the respondent to contend that the service is reasonably adequate. It further appears from the record, and is not disputed, that the service rendered in 1916 may be considered as the minimum of adequate service. To restore the service to the conditions then existing would require an increase computed by the company to amount to 28 per cent, and by the chief of our division of electric railroads at 38 per cent. Certainly, in view of the marked increase in

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population and the business activity of this great city, the service rendered four years ago can not reasonably be considered more than adequate now. An order would be proper requiring at least the restoration of that service, the details of which appear in the record, if there be any power or authority in this Commission, which it sees fit to exercise, requiring the installation of adequate service.

The record would not support an order directing service in excess of the service that was then furnished by the company and enjoyed by the public, although it is likely that a more developed inquiry into the details of the situation and evidence given in that regard would authorize the requirement of greater frequency in operation, especially on certain lines.

Admitting the failure to give adequate service, the company proceeds in its answer to excuse it upon the ground "that the cost of said service as rendered, based upon the methods of accounting prescribed by the Public Service Commission, and upon the laws of the State of New York regulating service and rates of fare in regard thereto, as found in section 49 of the Public Service Commissions Law, is greater than its revenue. It alleges that it was and is unable to furnish better or more adequate service, because such service is limited by the revenue from the five cent fare which it is compelled to charge in the city of Rochester; and further alleges that if the respondent is compelled to increase its service without an increased fare sufficient to pay the costs thereof, it will be unable to meet its indebtedness and other obligations and bankruptcy will be inevitable."

Upon the hearing evidence was submitted supporting this allegation, and although it is somewhat questioned by the representatives of the city, the overwhelming proof is that the rendition of adequate service, and perhaps of any service, can not be made and give adequate return to the company upon the present fare restriction of five cents in the city of Rochester. It is also possible that such adequate service can

not be rendered and a revenue derived therefrom sufficient to meet even operating expenses and taxes.

It has been determined by the Court of Appeals, and must stand as the law, as between this Commission, the City of Rochester, the railroad company, and the public, that this Commission has no power to increase the rate of fare in the city of Rochester. (*Quinby vs. Public Service Commission*, 223 N. Y. 244; *id.* 227 N. Y., advance sheets No. 987, page 49.) This decision of the Court of Appeals is based upon the theory that the delegation of power to this Commission is not in sufficiently "clear and definite language" to confer jurisdiction in cases where there is a restriction upon the rate of fare in a local franchise or agreement, to increase fares above the maximum fixed by such franchise or agreement. The City of Rochester, although frequently appealed to, has through its municipal authorities refused to increase the rate of fare, notwithstanding the large increase in costs of materials and labor necessarily involved in the operation of the railroad.

We therefore have a very clear and distinct issue here, important not only in this case but in many others which may arise, as to whether this Commission, where it has no power conferred upon it by the Legislature to raise a rate of fare to secure an adequate return, can still direct the rendition of adequate service and the performance by a railroad corporation of the obligations imposed upon it by law, as to which this Commission is charged with the duty of directing and enforcing compliance.

I have read with very great interest the learned opinion of my brother Barhite, who sat in this case. I am impressed with the amount of labor and the conscientious effort which have been expended to arrive at a proper determination, and I regret exceedingly my inability to agree with the conclusions reached as a result of this conscientious, earnest, and thorough going inquiry into the facts and the law made

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by him. I have come, as a result of careful consideration, to a different conclusion.

I believe in a case such as this, where the railroad, by reason of franchises accepted by it or agreements entered into between it and the local municipal authorities, has limited its right to collect fare to a certain specified amount, to increase which this Commission has no authority delegated to it by the Legislature, and the municipality refuses to modify or waive the limiting provision, that the railroad corporation is not thereby released from the obligation to discharge the duties imposed by law upon it, and it is still the duty of this Commission to see that such duties are properly discharged.

The duty of a corporation to properly perform its functions arises inherently from its organization as a corporation and its acceptance of its corporate rights and privileges (*People ex rel. Cayuga Power Corporation vs. Public Service Commission*, 226 N. Y. 527; *Tisner vs. New York Edison Co.*, 228 N. Y. 156), but beyond this duty inherently charged upon all corporations to properly perform public service for which they are created, there is, in regard to street surface railroads, an express statutory requirement to that effect.

The Public Service Commissions Law provides, in section 26, "Every corporation, person or common carrier performing a service designated in the preceding section, shall furnish, with respect thereto, such service and facilities as shall be safe and adequate and in all respects just and reasonable". The same statute places upon this Commission the express obligation to determine and prescribe what constitutes adequate service, and to direct the rendering thereof. (Section 49, subdivision 2.) This duty, imposed upon this corporation, of rendering adequate service, is a primary one and most important of all of its duties. It is to perform this duty that it is permitted to come into being, and upon

the performance of this duty depends the welfare in no small degree of the municipality in which it serves. It is difficult to underestimate the disaster which may follow insufficient and inadequate service by a street railroad, by which the growth of a municipality is affected, and upon which the ability of a large proportion of its population to discharge adequately and properly its daily tasks is dependent. In thousands of instances, in a city like Rochester, it must be that people have located their homes, perhaps even acquired property and built residences, relying upon the discharge of this duty by the railroad corporation, to whom the right to occupy the streets has been given, for the purpose of conveying them to and from their places of work and business. Adequacy of transit facilities is almost the breath of life of the outlying districts of our great cities. Trolley lines are the practical highways of a great proportion of the people. Distances from the scenes of work to the homes of the workers often can not conveniently be traversed on foot, and reliance must be had upon the public conveyance except in the case of those fortunates who are able to afford to go to and from the scene of their daily vocations by private conveyances or taxi cabs.

This great and primary duty of the street surface railroad can not be too vigorously enforced, and less than our full duty in the premises is discharged when a situation of this kind comes to our attention if we do not make the order definitely fixing and prescribing the service which is adequate and directing that it shall be rendered. The fact that this company states and shows that the present rate of fare is not sufficient to yield an adequate return for increased and adequate service, and perhaps is not sufficient to even pay operating expenses, is no answer. That condition exists, if it exists at all, by reason of the fact that this company has voluntarily, by the making of an agreement on its part, limited its right to collect fare to a certain amount, and the other contracting party, the City of Rochester, does not see

fit to waive its right to insist upon the performance of the obligation, notwithstanding the financial loss which will undoubtedly result to this company. If this restriction is binding upon this company, and there is no competent authority willing to relieve it from it, it has only itself to blame, because it voluntarily entered into this agreement. Unfortunately, contracts are frequently made by individuals and corporations with the effect that they entail financial loss, but that does not excuse them from the performance of their duties expressly imposed upon them by law. Financial inability to perform a contract, while it may in the end produce a practical situation embarrassing the enforcement of the right by the other party to the contract, is never a defense in an action or proceeding to determine the rights of the parties. Financial inability to perform is not an " impossibility " at law, which excuses performance.

It is not entirely clear that this company is bound by the five cent fare limit so frequently referred to. It is, however, quite certain through the decision of the *Quinby* case, that the power to raise fares in this case has not been delegated to this Commission. If this restriction to the five cent fare limit should be construed by the courts as an attempt on the part of the municipality to regulate rates of fare, it is not beyond the power of the courts to protect the company in view of the changed conditions from confiscation of its property in its discharge of its assumed duties by reason of the disparity between revenue and necessary disbursements. If the limiting provision is merely an exercise of the rate making power by the City of Rochester, a power which has been given to it by the sovereign state, such limitation is not effective in view of the changed conditions. If that is all that the limitation amounts to, the decision in the *Municipal Gas Co. vs. Public Service Commission*, 225 N. Y. 89, would be an authority to the effect that the company could charge a rate yielding an adequate return and restrain interference with the collection thereof by action in equity.

In the *Municipal Gas* case there was an express provision of statute law limiting the maximum rate to be charged in the city of Albany for gas to \$1. In view of increased costs it was held that this provision became unconstitutional when under changed conditions it deprived the company of the ability to earn an adequate return upon its invested capital. The court held that the rates to be charged by public service corporations could not be so fixed by statute as to preclude a fair return either at time of enactment or later. (Citing *Smyth vs. Ames*, 169 U. S. 466; *Minnesota Rate Cases*, 230 U. S. 352, 434; *Missouri vs. Chicago, Burlington & Quincy R. R. Co.*, 241 U. S. 533; *Rowland vs. St. Louis & S. F. R. R. Co.*, 244 U. S. 106; *City and County of Denver vs. Denver Union Water Co.*, 246 U. S. 178.)

If, therefore, the fare limitation made in this case is a result of the delegation to the City of Rochester of the rate making power, it can have no greater force or vitality or continuity of life than a direct statutory provision to the same effect, and must yield to the principle above stated that on account of changed conditions it becomes confiscatory.

If, however, this limitation should be held by the courts to be in the nature of a contract, and therefore come within the decision of the United States Supreme Court in *Columbus Ry. Power and Light Co. vs. City of Columbus*, 249 U. S. 399, still, as in that case, the company would not be permitted to be relieved from its obligation to discharge properly its corporate duties. If this should be held to be a contract rather than the exercise of the rate making power, and such contract is held to be binding, a question upon which it is not necessary for this Commission to pass at the present time, the result may be, if the other party to the contract insists upon its performance, that the railroad company will be forced into bankruptcy and forfeiture of its franchises. Unfortunate results in the making of improvident contracts and inability to read properly the future are not infrequent in our business life. The existence of such a

condition however does not in the slightest degree lessen the responsibility of this Commission to see that adequate service is rendered the city of Rochester. If this company has placed itself in a position where it is unable financially to perform its plain obligation, the sooner it is removed from the scene of action and the great privilege of furnishing local transit facilities, with its corresponding duty to make such facilities adequate, is assumed by others under less onerous conditions and under agreements more in consistency with the conditions of the times, the better. This Commission through its sitting representative has struggled faithfully to bring some working agreement in this serious situation. The lack of disposition on the part of the city authorities to relax, even in these unusual times, what it considers its strict rights in the matter, seems to render an amicable solution of the problem impossible by this Commission. In view of the decision of the Court of Appeals in the *Quinby* case, all that remains for us to do is to direct that adequate service shall be rendered, and with that adequate service ordered and defined, this company can go into the courts, as has the Municipal Gas Company in the case above cited, and by an appeal to equity procure an adjudication as to what its rights are in the premises.

Petition of THE POST ROAD AUTOMOBILE COMPANY, INC., under chapter 667, laws of 1915, and chapter 307, laws of 1919, for a certificate of public convenience and necessity for the operation of a stage route by auto buses in the incorporated villages of Tarrytown, North Tarrytown, and Ossining, it being proposed that the route shall be operated in and between the village of Tarrytown and the village of Ossining, Westchester county. [Case No. 7397.]

Public convenience and necessity require the operation of an auto bus stage line between Ossining and Tarrytown notwithstanding the service of The New York Central Railroad Company between those villages.

It is suggested, but not decided, that a municipality which has brought itself within the provisions of section 26 of the Transportation Corporations Law may withdraw therefrom by subsequent resolution.

Decided April 20, 1920.

Appearances:

John J. Sinnott, National Bank Building, Tarrytown, attorney for petitioner.

Edgar L. Ryder, Ossining, attorney for certain taxpayers, residents, and Trustees of the Village of Ossining.

Joseph A. Greene, Ossining, appearing for the Corporation Counsel of Ossining, and for a Committee of the Village of Ossining.

F. H. Stratton, Mount Vernon, representing the Hudson River and Eastern Traction Company.

Alexander S. Lyman (F. L. Wheeler appearing), Grand Central Terminal, New York city, General Attorney for The New York Central Railroad Company.

KELLOGG, Commissioner:

In this proceeding the petitioner applies for a certificate of convenience and necessity for the operation of an auto bus stage route from Tarrytown to Ossining, passing

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through the incorporated villages of Tarrytown, North Tarrytown, Briarcliff Manor, and Ossining, and the towns of Mount Pleasant and Ossining.

The Villages of Tarrytown, North Tarrytown, and Ossining have adopted resolutions bringing themselves within the provisions of section 26 of the Transportation Corporations Law, as permitted by chapter 307 of the laws of 1919.

The Village of Briarcliff Manor and the Towns of Mount Pleasant and Ossining have not availed themselves of the provisions of this amendment to the statute.

On various dates the three municipalities in question which brought themselves under the provisions of the Transportation Corporations Law, granted consent to this petitioner to operate the stage route in question, and such consent having been granted, application is now made here for our certificate.

The granting of the certificate is opposed by The New York Central Railroad Company, which is the only other common carrier between these villages, upon the theory that undue competition will be permitted with its lines.

The stage route in question has actually been operated for two years and loss in local traffic has occurred. Whether or not it is traceable to this stage line is problematical.

The bus line runs on a highway connecting New York city with Albany, and the villages to which it connects are populous and thriving. On this highway are numerous residences and public institutions of various kinds. The Vanderlip School is among the number, and the stage route has proved a great convenience in transporting passengers to and from that institution.

The railroad undoubtedly serves the commuting public, who constitute a large portion of these municipalities, in their daily trips to and from New York, and the bus line can not compete with it for this service, but for local trips the railroad is inadequate and too inaccessible. The villages in question lie upon the top of a steep hill from the Hudson

river along the bank of which the railroad runs. The distance from the railroad stations to the residences of the people residing along this old post road is in many cases substantial, and in all cases negotiated only by arduous uphill travel, or the use of conveyances. There can be no doubt that the stage route has and will prove a public convenience and serve a public necessity.

The authorities of the Village of Ossining, however, oppose the application on a somewhat unusual ground. They say that the auto bus line serves a great convenience, and should be permitted to run, but the action of the board of trustees in placing the municipality within the provisions of section 26 of the Transportation Corporations Law was resented by the people, who at the ensuing village election early in March elected a sufficient number of trustees to change the attitude of the board on that question, and the board has since, under date of March 16, 1920, adopted a resolution that the village be not bound by the provisions of section 26.

The prevailing opinion in the municipality now is that the operation of auto buses within its boundaries should not be limited to those securing a certificate from the village and the Public Service Commission, but that the rendering of such public service should be open to all parties desiring to furnish the same.

The consent which had been given by the Village of Ossining contained various conditions permitting competition in certain prominent sections, but aside from such conditions, it can not successfully be claimed that the granting of this certificate will give this applicant exclusive rights over any part of the road in question. A certificate to that effect can be issued to a competitor, if it appears in the future that the public convenience and necessity require such issue, and the facilities rendered by this applicant are not sufficient or are unsatisfactory.

I think we may treat the Village of Ossining in this

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situation as if it had not brought itself under the provisions of the Transportation Corporations Law, and that its withdrawal therefrom is legally valid.

However this may be, the duty remains to pass upon this application by reason of the fact that the Villages of Tarrytown and North Tarrytown are still within the provisions of the section in question, thus rendering it necessary for the petitioner to obtain our consent if he desires to continue operations, and the last thing that the Village of Ossining seems to desire is the cessation of such operations.

It appears therefore that two villages on the route of this proposed line have adopted resolutions which, standing unrepealed and unrepealed, require action on the part of this Commission. That public convenience and necessity will be served by the granting of a certificate appears clearly from the evidence, and a certificate accordingly should be granted.

Although the Village of Ossining has by resolution withdrawn itself from the provisions of section 26 of the Transportation Corporations Law, the consent which it granted the petitioner contains certain conditions which were accepted by the latter, and although said village subsequently to the granting of such consent withdrew itself from the provisions of the Transportation Corporations Law, compliance with these conditions, as well as the conditions contained in the consents granted by the Villages of Tarrytown and North Tarrytown still outstanding and effective, should be required by our order.

All concur.

In the Matter of the Application of the HORNELL TRACTION COMPANY for permission to operate cars with one man on its North Hornell line. [Case No. 6996.]

Where a traction company makes application for permission to operate cars with one man, and such cars pass over a railroad at grade where no flagman is provided, safety of operation is the controlling factor in the case, and such permission will be denied until the methods of operation and the appliances provided by the company are sufficient in the judgment of the Commission to assure reasonable safety.

Decided April 22, 1920.

Appearances:

Milo M. Acker, Attorney, Hornell Traction Company, Hornell.

Robert W. Bull, Receiver, Hornell Traction Company.

C. L. Lathrop, Superintendent of Telegraphs and Signals, Pittsburg, Shawmut and Northern Railroad.

J. D. Brainer, Trainmaster, Pittsburg, Shawmut and Northern Railroad.

J. W. Thompson, Roadmaster, Pittsburg, Shawmut and Northern Railroad.

VAN NAMEE, Commissioner:

In this matter a public hearing was held by Commissioner Fennell at which testimony in support of the application was given. No one appeared in opposition, nor was any testimony given against the granting of the application.

The evidence and the papers in the case show that the Hornell Traction Company operates a system of electric railroads in the city of Hornell with a branch extending to Canisteo, with a total main line track of 9.83 miles. There are four lines of cars operated on the system, namely: White line 3.11 miles; Green line 1.07 miles; North Hornell line 1.12 miles; and the Canisteo line 4.53 miles. Eight cars are required for regular service on the entire system.

The application of the company in this case is for approval of operation of one-man cars on its North Hornell line. There are two cars in service on this line. The single track of this route crosses at grade the single track of the Pittsburg, Shawmut and Northern railroad. This crossing is on Seneca street in the city of Hornell. The approaches to the crossing on the electric road are on a tangent and level. There are thirty-six movements daily on the electric track over the crossing. The traffic on the steam track is principally switching movements which occur at irregular intervals, usually three or four per day, some times with the engine ahead of cars, at other times behind them.

The company in its application states that in addition to the motorman going ahead to the crossing before going over it, as a further protection it proposes to erect a signal system with signals automatically operated by the electric cars showing clear on electric track and red on steam track, or *vice versa*.

Decision in this case has been delayed with the approval of the applicant pending a determination in a similar case where the Empire State Railroad Corporation applied to the Commission for approval of operation of one-man cars in the city of Oswego. In this city the electric track crosses steam tracks at six points, three main line and three industrial siding tracks. In this case the Commission after thorough investigation approved the operation over the industrial sidings crossings on the execution of an agreement between the steam and electric companies that all movements on the steam tracks over the crossing should be made under flag preceding the train, car, or engine over the crossing.

Records in this office show that in the past the most serious and frequent accidents on electric roads occurred at grade crossings of steam and electric tracks, in one of which fifteen persons were killed outright and a large number seriously injured. The efforts of this Commission have for a

number of years been directed to imposing regulations in the interest of safety of operations at these points with gratifying results, as previous to 1913 a large number of such accidents occurred each year, and during the past seven years these have been reduced to a total of four. Notwithstanding this record of increased safety, in November, 1919, the Commission addressed a letter to all electric railroad companies in this Public Service District calling attention to the possibilities of accidents at grade crossings of steam and electric tracks, and suggested additional rules to increase the element of safety at these points. All companies have accepted these rules and they are now in force.

The fixed capital of this company as shown by its annual report as of December 31, 1919, was \$291,643.

The income account for the year 1919 shows—

Operating revenues.....	\$70,919.00
Operating expenses.....	64,275.31
Net revenue railroad operations.....	\$6,643.69
Taxes.....	3,470.76
Operating income.....	\$3,172.93
Non-operating income.....	103.00
Gross income.....	\$3,275.93
Interest.....	7,500.00
Profit and loss (deficit).....	\$4,224.07

The financial statement of the company's operation in 1919 shows the necessity for reduction in operating expenses. The present application is an attempt in that direction.

By the operation of one-man cars on the North Hornell line the company claims its operating expenses would be reduced \$2100 per year. This would be of material benefit to the company as well as to the traveling public, and would be a proper thing to do if it could be done without breaking down any of the necessary safeguards at these crossings.

The chief of the electric railway department of this Commission reports that in his judgment the methods of operation and appliances proposed by the company are not sufficient to insure reasonable safety in the operation of one-man cars over the Seneca Street crossing in the city of Hornell.

The Commission, after careful consideration of the subject, due consideration being given to the financial condition of the company, decides that safety of operation is the controlling factor in this case and that the provisions of the order in the Oswego case should apply in this case.

Therefore, until arrangements can be made to operate electric cars over the Seneca Street crossing under protection of a flag by a flagman stationed at the crossing or preceding the movement on the steam track, the application should be denied, and an order to that effect has been entered herein.

Chairman Hill and Commissioners Irvine and Kellogg concur. Commissioner Barhite not present.

Petition or Complaint of **POUGHKEEPSIE AND WAPPINGERS FALLS RAILROAD COMPANY**, filed February 2, 1920, under subdivision 1, section 49, Public Service Commissions Law, and section 181, Railroad Law, for permission to increase passenger fares. Also for permission to put tariff in effect on short notice. [Case No. 7351.]

Decided April 27, 1920.

Appearances:

H. C. Hopson, 61 Broadway, New York, for petitioner.

George Worrall, Corporation Counsel, for the City of Poughkeepsie.

Ralph F. Butts, as Mayor of the City of Poughkeepsie.

Holmes Vanderwater, Poughkeepsie, as attorney for fifteen hundred passengers and students at Vassar College.

Burges Johnson, Vassar College, Poughkeepsie.

Joseph B. Lyons, Wappingers Falls, for business men and commuters generally of Wappingers Falls.

Ellsworth Traver and *John Hunt*, as members of the Board of Trustees of Wappingers Falls.

John Bradley, Poughkeepsie, as President of the Poughkeepsie Trade and Labor Council.

Michael J. Leonard, Poughkeepsie, representing Local Union No. 203, Brotherhood of Carpenters and Joiners.

Ronald Bogle, Wappingers Falls, in person.

James B. Way, Alderman Sixth Ward; *Harry M. Smith*, Alderman Sixth Ward; and *James H. Mulvey*, Alderman First Ward, as a committee of the Common Council of the City of Poughkeepsie.

James Nolan and *Raymond Kinney*, Poughkeepsie, representing State Hospital Employees' Union of Poughkeepsie.

Edward M. Drake, Wappingers Falls, representing school children and commuters generally of Wappingers Falls.

HILL, Chairman:

Petition under subdivision 1, section 49, Public Service Commissions Law, and section 181 of the Railroad Law, for

increased fares in the city of Poughkeepsie, and also on petitioner's short interurban line running to Wappingers Falls.

By order under date of June 6, 1918, the fare in the city of Poughkeepsie was increased from five to six cents, and in each of the three zones on the interurban line a similar increase from five to six cents. Petitioner now desires to increase the six cent unit to eight cents, with seven tickets, each good for an eight cent ride, for fifty cents. It also proposes increases ranging from 40 to 50 per cent in school and commutation tickets; also increases of 20 to 25 per cent in chartered car rates.

The opinion in the previous proceeding referred to appears in P. S. C., 2nd D., Vol. VII, page 138, and the increase there authorized was estimated to increase the gross income of \$33,471 in 1917, to \$46,750 in 1918. This expectation was somewhat disappointed, in 1919 the gross income having reached only \$42,352.17. This amounted to about 4.95 per cent return on the value of the company's property devoted to the public use.

It is estimated that the proposed increases will yield an additional \$20,000 after making an allowance for some falling off in traffic. Based upon the precedent established by the other case, the present value of the property is about \$845,000, including about \$35,000 working capital, so that should this expectation be realized, a return between 7 and 8 per cent will result.

The property of the company is in very unsatisfactory condition. This was so at the time of the former determination, and as will be seen by reference to the opinion and order in that proceeding, there was a very large amount of deferred maintenance in the property. At a later date, an examination and report made by the Commission's chief of division of electric railroads indicated that such deferred maintenance amounted to approximately \$350,000. One provision of the order made at that time was in effect that this deferred maintenance should be made

good as soon as possible, and that no dividends should be paid on the capital stock of the company until that had been accomplished. This order has been complied with in the respect that no dividends have been paid, but only about \$20,000 has been expended in the way of improvements, so that the conditions are not materially improved, and no substantial progress has been made along the lines of improvement directed in the former order. It is, however, only fair to say that the company has enjoyed a very limited credit and has been much embarrassed in its financing. In addition to the improvement programme above mentioned, the company is now in need of additional car equipment properly to care for its service. The deterioration of service which is the outgrowth of the conditions referred to is very serious and must be given prompt attention to insure an ultimate return to a reasonable standard.

At the hearing, the operating management was severely criticised, the defects therein being largely attributable to the shortage of cars and bad condition of track.

Criticism was also made of the annual expenditures of the company for total general and miscellaneous expenses. For the year ended November 30, 1919, the salaries and expenses of general officers amounted to \$11,237.91, in addition to which, under a contract with the J. G. White Management Corporation covering the management of the company and its business, there was a disbursement of \$7904.99. This total of \$19,141.90 compares with \$6239 paid by the Syracuse and Suburban Railroad of practically equal length; \$4114 by the Geneva, Seneca Falls and Auburn Railroad of substantially equal length; and \$4912 by the Cortland County Traction Company of about the same length. The Poughkeepsie road has a total length of only 16.65 miles, and as compared with other roads of its length and class the item of expense referred to seems clearly excessive. The expenditure for salaries of general and other officers, which I have referred to, namely \$19,152.90, is in addition to \$3290.97 expended for salaries and expense of general office

clerks, making a total of \$22,433.87. The Commission feels called upon to criticise this expenditure and is of opinion that it is at least double what is necessary. These expenses should be immediately revised, and the Commission is confident that such revision of management can be brought about as to effect a saving in operating expenses of approximately \$10,000.

Anticipating such a saving, the aim of the company to increase its revenues by \$20,000 per annum will be accomplished by an additional \$10,000 to be realized from increased rates. It is useless to attempt to estimate with exactness the outcome of any given increase. There would be less falling off of traffic with a seven cent unit of fare than with the proposed eight cent unit, and the desired amount can probably be realized by an increase of six to seven cents in each of the zones, with no discount for tickets. By the terms of the former order no increase was allowed on either monthly commutation tickets or school tickets. A 25 per cent increase in the commutation rate, and a 20 per cent increase for school tickets, should be sufficient. The order to be entered will specify the exact prices to be charged for the different classes of books in substantial conformity with the percentages named. The new rates for chartered cars are not unreasonable and are approved. The order will also provide for the redemption in cash of lower rate tickets now outstanding.

The terms of the monthly commutation fare between Poughkeepsie and Wappingers Falls, described in the present schedule as Special Monthly Commutation Tickets, should be made less rigid than they now are. As now restricted, in addition to the more usual limitations on the use of such tickets, they are good only on trips scheduled to leave either terminus at or before 8 a. m., and between 12 m. and 9:20 p. m. The complaint seems to be well founded that this restriction to the hours stated is a source of constant irritation and annoyance, and in view of the increase now granted it can fairly be eliminated. The somewhat

similar restrictions which apply between Poughkeepsie and Kingwood Park, and between Wappingers Falls and Kingwood Park, should be eliminated for the same reason.

The proposed increases should not in my opinion become effectual except upon conditions which shall satisfy the Commission that at least one hundred thousand dollars will be expended in the purchase of additional cars and improvements of the company's track and property, in addition to ordinary maintenance, during the ensuing year. This should be required because in the present condition of the property the service is deficient, inadequate, and unreasonable, and unless these objections are to be met promptly the Commission does not feel that the public should be called upon to pay increased fare. The company will also be expected to meet the other requirements of the previous order in this respect, subject to further orders of the Commission as to limitation of time after the expenditure of the first one hundred thousand dollars.

An order will be entered accordingly.

All concur.

Petition or Complaint of SOUTHERN NEW YORK POWER AND RAILWAY CORPORATION under subdivision 1, section 49, Public Service Commissions Law, and section 181, Railroad Law, for permission to increase passenger fare in the city of Oneonta. [Case No. 7378.]

Decided April 27, 1920.

Appearances:

N. P. Willis, Esq., attorney for petitioner.

BARHITE, Commissioner:

This is an application by the Southern New York Power and Railway Corporation asking the Commission to fix seven cents as a just and reasonable fare within the city of Oneonta. Notice of the hearing was duly published and given to the Chamber of Commerce and to the Mayor and Corporation Counsel of the City of Oneonta, but no opposition has been made to the application. The petitioner operates a trolley railway in the counties of Otsego and Herkimer, the main line extending from the village of Mohawk in Herkimer county, to the city of Oneonta in Otsego county, with a branch line from Index to Coopers-town. The main line is approximately fifty-eight miles in length; the Oneonta City line is practically four and one-half miles in length.

In 1918 the company made application to this Commission for permission to increase its fares outside of the city of Oneonta. As the result, upon a hearing of the application the prayer of the petition was granted, and an order was made on the 31st day of December, 1918, allowing the company to charge outside of the city of Oneonta, four cents a mile for cash fares and tickets, and three and one-half cents a mile for mileage books, these rates to go into effect on five days' notice. We thus have before us the effect of the above rates for practically the entire year of 1919. For that year the total operating revenues were \$381,326.43;

the railway operating expenses were \$268,093.49: leaving a net revenue from railway operations of \$113,232.94. To this amount must be added other revenues of \$1959.74, making a gross income, after deducting taxes of \$18,107.80, of \$97,084.88. From this amount must be taken interest on funded and unfunded debts and other miscellaneous items amounting in the aggregate to \$68,835.77, leaving a net income balance of \$28,249.11. The allocation of the various items of income and expense shows, however, a loss from the operation of the road in Oneonta of \$19,038.50. The number of passengers carried at a five cent rate in that city during the year 1919 was 609,233. An increase in fare usually results in a decrease in patronage, but if we assume that the number of passengers with the seven cent fare desired is the same as during the year 1919, the company will add to its income in the city of Oneonta \$12,184.66, which still leaves a deficit from operations in that municipality of \$6853.84 per year, with a net income of \$40,433.77 resulting from the operations of the entire line. Under the proposed rate of seven cents in the city of Oneonta, the company stockholders would receive a return of slightly more than 3½ per cent upon their property, as appears from the following statement:

Company's gross income for year 1919.....		\$97,084.88
Company's estimated increase due to seven cent rate in Oneonta		12,184.66
Company's estimated gross income.....		\$109,269.54
Fixed capital less depreciation.....	\$2,015,155.74	
Working capital.....	85,758.67	
Present value of company property including working capital.....	\$2,100,914.41	
Fixed Charges:		
Bond interest (\$950,000 bonds).....	\$54,904.00	
Interest on unfunded debt.....	12,851.55	
Amortization of discount on funded debt..	88.00	
Miscellaneous debits.....	1,047.22	68,885.77
Balance applicable to stockholders' return.....		\$40,433.77
Stockholders' equity.....	\$1,150,914.41	

A rate of seven cents in Oneonta should be allowed.

All concur.

No. 494:231

In the Matter of the Complaint of the TRUSTEES OF THE VILLAGE OF BABYLON, L. I., *against* LONG ISLAND LIGHTING COMPANY as to increased rates for gas furnished the public. [Case No. 7136.]

Decided April 29, 1920.

Appearances:

Harry P. Fishel, Esq., attorney for complainant.

Messrs. Elmer B. Sanford and Martin S. Decker for the respondent.

BARHITE, Commissioner:

This proceeding is based upon a complaint made by the Board of Trustees of the Village of Babylon against the Long Island Lighting Company, to the effect that the company, pursuant to a schedule filed with this Commission, proposes to raise its rates for gas twenty-five cents per thousand cubic feet, and to put into effect a minimum charge of \$1 per month. The village offered no evidence. No objection is offered to the monthly minimum charge. The company operates an electric light plant as well as a gas plant. The company, in allocating its property, has put those items which naturally must be assigned to either the electric or the gas business, into their proper department. This arrangement shows a ratio of 24 per cent for the gas and 76 per cent for the electric side of the business. Those items which are of a composite nature are divided by the same percentage. The entire revenue shows that 24 per cent is obtained from the gas and 76 per cent from the electric side. General overhead expenses are divided in the same proportion. An examination of the items of property, of its income and its expenses, shows that the division is fair, and may be said to be slightly against the interest of the company rather than in its favor.

Under the law and the decisions the company is entitled to a fair and adequate return from its gas business irrespective of its return from its electric business. The financial

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condition of the company, as it appears from the record, is as follows:

Total fixed capital as of October 31, 1919.....	\$841,433.67
Less reserve for depreciation.....	30,750.50
Value of property as of October 31, 1919.....	\$810,683.17
Allowance for working capital.....	79,281.83
Amount upon which to compute return.....	\$889,965.00

The allowance for working capital is based upon the balance sheet of the company, and consists of the following items:

Cash	\$20,800.91
Materials and supplies.....	30,001.15
Prepayments	9,087.10
Suspense	161.15
Accounts receivable.....	19,251.52
Total	\$79,281.83

The balance sheet of the company shows accounts receivable amounting to \$72,083.42, but it appears by the evidence that of this amount \$52,831.90 is due from other companies, leaving \$19,251.52 as the amount of accounts receivable included in working capital.

The estimated result of operation under the new rates is as follows:

Company's reported gas operating revenues for 12 months ended October 31, 1919, at the old rates (Company's exhibit No. 5).....	\$174,906.85
Company's estimated increase of gas revenue for 12 months ended October 31, 1919, at the new rates (Company's exhibit No. 12).....	24,548.71
Company's estimated total operating revenues for 12 months ended October 31, 1919, based upon new rates.....	\$199,455.56
Company's reported gas operating expenses for 12 months ended October 31, 1919, based upon old rates.....	145,468.44
Estimated gross income for 12 months ended October 31, 1919, based upon new rates.....	\$53,982.12

leaving \$53,982.12 to pay a return upon \$889,965, or at the rate of approximately 5.7 per cent.

The complaint should be dismissed.

All concur.

In the Matter of the Complaint under sections 71 and 72, Public Service Commissions Law, of HARRY N. HOFFMANN, AS MAYOR OF THE CITY OF ELMIRA, *against* ELMIRA WATER, LIGHT AND RAILROAD COMPANY as to rates proposed to be charged for natural gas; also in respect to examination of the gas property and books of said company by the city. [Case No. 6759.]

Petition or Complaint of ELMIRA WATER, LIGHT AND RAILROAD COMPANY under sections 71 and 72, Public Service Commissions Law, for permission to increase natural gas rates in the city of Elmira, town of Elmira, and town of Southport, Chemung county. [Case No. 6907.]

Various contentions as to allowances for prospective expenditures considered and determined, in fixing rates for natural gas.

Federal income taxes should not be allowed for in rates to be fixed. Payment thereof should be made at the expense of the stockholders of a public utility corporation and not by its rate paying customers.

Legal expenses incurred in a rate case should not be considered as an ordinary annual expenditure in determining the amount of such expenditures in a rate fixing case. Such expenditures should be spread over a period of years in arriving at a result. The average expenditure per annum for a reasonable period in the past for legal expenses should be controlling.

A return of 8 per cent held to be reasonable under the circumstances of the case decided.

Decided April 29, 1920.

Appearances:

Boyd McDowell, Corporation Counsel, for the City of Elmira.

Michael Danaher, Corporation Counsel of the City of Elmira.

Cornelius O'Dea, as Chairman of Gas Committee of the Common Council of the City of Elmira.

Beekman, Menken & Griscom (by M. G. Bogue), 52 William street, New York city, and *Stanchfield, Lovell, Falck*

& Sayles (by Halsey Sayles), Elmira, for Elmira Water, Light and Railroad Company.

KELLOGG, Commissioner:

These two proceedings were heard together and involved the same issues.

Case No. 6759 arose by reason of the fact that on January 20, 1919, the company filed a proposed schedule of increased rates for natural gas, against which the city filed its complaint. An injunction was issued by the Supreme Court prohibiting the putting of such rates into effect until passed upon by this Commission. The schedule filed by the company and complained of by the city provided for a charge of 70 cents per thousand cubic feet for the first 2000 cu. ft. consumed each month, with an inverted block rate increasing the cost to 80 cents per M cu. ft. for the next 8000 cubic feet consumed per month, and \$1 per M cu. ft. on the excess. There was no discount for prompt payment, and the tariff provided for a minimum charge of 75 cents per month.

In case No. 6907, the company asked for an order fixing a still higher rate, namely, 85 cents net for the first 12,000 cu. ft. per month; \$1 net for the next 8000 cu. ft. per month; and \$1.15 per M cu. ft. for all in excess of 20,000 cu. ft. per month.

The tariff which is at the present time in force provides for a rate of 52.5 cents per M cu. ft. with a minimum charge of 60 cents a month. It also provides that if a bill be not paid within ten days of its date an excess of 5 cents per M cu. ft. will be charged. The amount realized from these charges during the year 1919 was 54.02 cents per thousand cubic feet sold, on the average.

Upon the hearings in these cases it was agreed by the parties that the Commission should first determine the rate base upon which a fair return should thereafter be computed. Accordingly, after the submission of evidence on that point, this Commission, by its decision made January 22, 1920,

fixed the rate base at \$620,139.67, consisting of physical property in use \$602,639.67, and working capital \$17,500.

A very carefully thought out opinion in the case was written by Commissioner Fennell, and was concurred in by Commissioners Irvine and Kellogg, Chairman Hill concurring in the result. Commissioner Barhite was not present at the time of the decision and took no part therein. This result, receiving the concurrence therefore of all of the voting members of this Commission, should stand as the rate base for further computations.

The company, however, now seeks to question this rate base, and still insists that an item of \$100,000 allowed in an issue of capital stock by the Commission of Gas and Electricity in 1906, should be added to the amount to be allowed as a rate base. This item does not represent anything that can be located. It was very carefully considered when the fixing of a rate base was before this Commission, and after such consideration was deliberately disallowed. There is no reason not then considered which is now suggested for the allowance of this item, and it should not be allowed either directly or in any of the indirect methods suggested by counsel for the city. The rate base should stand as fixed by this Commission, and if error has been committed in that regard it is subject to review with the other questions involved in the case.

To the rate base as found by the Commission, however, as of June 30, 1919, there should be added additions and withdrawals to the gas property for the next six months, to bring the computation down to January 1, 1920. This results in a slight addition and raises the figure to \$623,388.98, which must stand as the basis upon which a reasonable return should be computed.

Further inquiry is materially shortened for the reason that this company does not itself produce the gas furnished but purchases it from the Potter Gas Company, which transports it from gas wells in Pennsylvania and sells it to the Elmira company at 26.6 cents per M cu. ft., delivered at

the city line. In order to determine the expense per M cu. ft. of distributing the gas, it is necessary to make a determination as to how much will probably be sold in the years to which the rate will be applicable. A very serious dispute on this question has arisen between the parties. It is apparent that the supply of natural gas is materially lessening, and it also appears that the amount which this company has purchased and distributed has grown less year by year.

The recent history in this regard is as follows: Gas sold in year 1917, 460,737 M cu. ft.; gas sold in year 1918, 402,201 M cu. ft.; gas sold in year 1919, 395,399 M cu. ft.

A statement of the amount of gas sold for the year ended January 31, 1920, that is, substituting the month of January, 1920, in place of that month of 1919, shows a sale of 378,127 M cu. ft.; whereas, for the twelve months ended February 29, 1920, the sales were 362,626 M cu. ft. This large decrease of sales (taking the years which included the first month or the first two months of the present year instead of corresponding months of 1919) was due to the greater severity of the weather in the winter just past, as compared with the milder conditions in the year preceding it. The supply of natural gas available to Elmira, at the end of the Potter Gas Company's transmission line, decreasing in a marked degree under cold weather conditions due to its increased use by localities nearer the source of supply, explains to some extent at least these decreased sales in Elmira. It is of course difficult to foretell the future, but it is necessary upon the evidence to make the best estimate possible. Upon the evidence submitted, comparing 1919 with 1918, there appeared to be a slight decrease in gas sold. It is probable this decrease will continue still further during the present calendar year. I think the figures which are submitted as for the year ended January 31, 1920, including as they do the severe January of 1920 but the milder February of 1919, may be considered the best data available upon which to found an estimate for conditions as they will develop in the future. Therefore, for purposes of further computation, the amount purchased

from the Potter Gas Company during that period, containing much of the extreme cold weather, sufficient to offset the factor of diminishing supply, amounting to 399,294 M cu. ft., will be taken as the basis of annual gas supply for the future.

Another important question entering into the problem is the amount of gas lost in distribution. The price to the company is fixed at the city gates; the amount delivered is at the customer's meter. Intermediate these two points there is a substantial amount of gas lost by leakage, or for other unaccounted for reasons. What this amount, under normal conditions, may be computed at, is a matter of serious dispute. The average loss since November 1, 1917, amounted to 9.94 per cent. As opposed to this, an exhibit introduced by the company shows a leakage for twelve months ended January 31, 1920, of 21,167 M cu. ft., or 5.3 per cent. The reduction in this percentage of loss is accounted for by the city upon the theory that the company, since November 1, 1917, having to pay for its gas at the city gate instead of for the amount consumed by the customer, has been very careful about its losses and has thoroughly overhauled its gas meters, and the city's counsel urges that the actual experience of this year ended January 31, 1920, with a loss of 5.3 per cent, be taken as a guide for the future. Whereas this loss of 5.3 per cent is unusually low in the history of this company, the average loss in the years preceding, when the company had to pay only for the gas actually sold to customers before the general overhauling of meters in use, is too high for a proper basis on which to determine the probable future experience in this regard. Under all the circumstances, a leakage or loss of 7 per cent may fairly be taken for the purposes of this case.

There are various minor items of cost of operation which are in dispute among the parties. The company introduced an exhibit showing a total distribution expense of \$15,722, which was the actual experience for the twelve months ended January 31, 1920. It urges that \$5000 be added, on the

theory that the distribution expenses paid during the year, as shown by their exhibit, were low, especially as to repairs of gas mains. There is nothing to support this in the evidence; the longevity and durability of the gas mains is very satisfactorily proven. Neither is there substantial weight to the contention of the city that certain minor deductions should be made, on the theory that some of the expenditures were unusual. It is a fair inference, from the evidence, that the expenditures of the year in question may be taken as an average basis of the years to come, especially as we have already come to the conclusion to allow the amount of gas actually consumed during that year as a basis for further computation. The attempts by both parties to depart from this experience as a basis for probable cost for the future, should be disapproved, and general distribution expenses should be estimated at the figure of \$15,722.

There seems to be no dispute as to the so called "commercial expense" which is placed at \$5136. The item of \$834 for "promotion expense," although challenged by the city, is reasonable. The company will be charged with a miscellaneous income of \$2404, largely from the sale of appliances, which is a proper and legitimate enterprise for such a company, the expense of maintaining which is a proper charge.

The item of "general expense," as submitted by the company, is challenged as to two of its items by the city:

First: There is a general legal expense item for which the company claims an allowance on the basis of the last year's experience of \$6208.33. This is largely made up of expenses in this rate case, and is undoubtedly an extraordinary expenditure.

The expenditure for general law expenses prior to this year is only \$125 a year for 1911, 1912, 1913, 1914, and 1915; \$280 for the year 1916; \$452 for the year 1917; and \$1600 for the year 1918. It would not be proper to charge this unusual expenditure of 1919 on the theory that it was an annual occurrence, and fix rates upon that theory.

While the expense of conducting rate proceedings is a proper deduction, inasmuch as the results of such litigation accrue during a period of years, the expenses therefor should also be distributed.

In *Munn v. Sutter-Butte Canal Company*, P. U. R. 1918-E 563, the California Railroad Commission held: "The expenses of a utility in preparing for a rate proceeding before the Commission should be amortized over a period of years, since it is not an annual expense." (See also *Re Western Colorado Power Company*, P. U. R. 1918-E 629, Colorado; *Knowlton v. Farmington Village Corporation*, P. U. R. 1918-E 884, Maine; and *Re Hydro-Electric Light and Power Company*, P. U. R. 1918-A 325, Indiana.)

It would seem that this expenditure should be distributed over a period of at least three years, and taken in connection with the average expenditure in past years, \$2500 is a fair allowance for annual legal expenses. A reduction in this account from the amount claimed by the company of \$3708 should be made for this item.

Second: The allowance claimed for uncollectible bills per annum of \$1500 is too high. It is far beyond the experience of the company, which for the past ten years has been at the rate of \$232 a year. Under the law, the company may insist upon a deposit to secure doubtful accounts, and no large loss on account of failure to so insist can be complained of or to any large extent be properly charged up to those who actually pay for their gas.

The allowance for this purpose of \$300, conceded by the city, seems to be ample. This would require a reduction of \$1200 from the table submitted by the company.

The deduction suggested from the two items of legal expense and uncollectible bills, aggregating \$4908, leaves this item of general expense at \$12,919.

The taxes which the company claims it should be allowed for, include a federal income tax of \$2444. This can not be allowed, for the reasons stated by Chairman Hill in the

case of the *Iroquois Natural Gas Co.*, P. U. R. 1919-D 93. In referring to a claimed deduction of a federal income tax, the Chairman writes as follows:

"I think this tax can not be considered as a deduction, like property and franchise taxes, before striking a balance which will represent the net income or return on investment. The income tax is a tax not on property or earnings, but on the income as such. In intent it is not a tax on the corporation or its property, but on the income which is transmitted to its final recipient, the stockholder, and is paid at the source purely as a matter of expediency in its collection. This is obvious because the dividend in the hands of the recipient is relieved from the tax upon it being shown that it was paid at the source and not otherwise. If it were paid by the stockholder he could not transfer the burden to the consumer and thus spread it over the general community, nor was it the intent of the statute that he should be allowed so to do; but if the corporation is allowed to deduct it as an expense before arriving at the net income or rate of return, the statutory intent in this respect will be defeated."

Public service commissions in other States have followed the same rule, the propriety of which is obvious. (*Indiana Public Service Commission re Home Telephone Company*, P. U. R. 1919-C page 209. *California R. R. Commission re Western States Gas and Electric Co.*, P. U. R. 1919-B 485.)

This leaves the items of taxes allowable at \$7372.

The amount which should be allowed for depreciation is that claimed by the company of \$12,000. Under all the circumstances in the case, considering the condition and future prospects of the property, this amount, which is slightly under 2 per cent of its investment value, can not reasonably be considered too high.

As suggested in the opinion of Commissioner Fennell, in arriving at a rate base, the company should be charged with interest upon the amount in its depreciation fund, \$24,000, collected from the rate payers. Deducting interest on this amount, or \$1440, leaves \$10,560 to be charged to current operating expenses.

A rate of return of 8 per cent, under present conditions, would seem to be proper. Such a return should be considered adequate under the law and not excessive. The Commission should bear in mind the present conditions and the higher cost of money than formerly maintained. On the other hand, the major portion of fixed capital of this company is represented by outstanding bonds which bear only 5 per cent interest. Eight per cent must be taken, therefore, as a fair return. (See *Lincoln Gas Company v. Lincoln*, 250 U. S. 256.)

The following table shows the claims of the parties, together with the foregoing findings:

	<i>Company's claim</i>	<i>City's claim</i>	<i>Commission's findings</i>
Rate base found by Commission.....	\$623,389	\$623,389	\$623,389
Rate of return.....	9 per cent	7 per cent	8 per cent
Gas purchased, M cu.ft.....	357,000	399,294	399,294
Gas lost or unaccounted for, M cu.ft.....	35,600	21,167	27,951
Gas sold, M cu.ft.....	321,400	378,127	371,343
Operating expenses:			
Cost of gas.....	\$94,962	\$106,213	\$106,213
Distribution expense.....	20,722	15,303	15,722
Commercial expense.....	5,136	5,136	5,136
Promotion expense.....	834	134	834
General expense.....	17,827	12,627	12,919
Taxes.....	9,816	7,372	7,372
Amortisation.....	12,000	9,000	10,560
Totals.....	\$161,297	\$155,785	\$158,756
Return on investment.....	56,105	43,637	49,871
Total revenue required.....	\$217,402	\$199,422	\$208,627
Less miscellaneous income.....	2,404	2,404	2,404
Total revenue required from gas sales.....	\$214,998	\$197,018	\$206,223

The maximum rate should be so fixed, therefore, as to permit the company to realize annually the sum of \$206,223 upon an estimated sale of 371,343 M cu. ft., or approximately 55.5 cents per M cu. ft.

As indicated at the outset of this opinion, the company realizes on the average slightly over 1½ cents per M cu. ft. over its net rate by reason of its minimum and delayed payment excess charges. The maximum rate, therefore, should be fixed at 54 cents per M cu. ft. The figure here arrived at of 54 cents per M cu. ft. does not diverge sufficiently from the present rate of 52.5 cents to authorize any change in either the minimum or the delayed payment excess rates.

The suggestion of the company to install an inverted block rate affecting the larger consumers, for conservation purposes, should not at the present time be allowed, but may very properly be taken up later with the consideration of this question as it affects the natural gas problem generally throughout the State.

Orders, therefore, should be entered fixing the maximum rate to be charged for natural gas by the Elmira Water, Light and Railroad Company at 54 cents per thousand cubic feet, continuing the present minimum and delayed payment excess charges.

In view of the condition of the natural gas industry in general, and the Elmira situation in particular, the period to be fixed, pursuant to section 72 of the Public Service Commissions Law, during which said maximum price may be charged, should be one year, and thereafter until the further order of the Commission.

All concur.

No. 496:243

Petition of RICHARD H. CLARK under chapter 667, laws of 1915, for a certificate of public convenience and necessity for the operation of a stage route by auto buses in the cities of Sherrill and Oneida, it being proposed that the route shall also be operated between those cities. [Case No. 7398.]

A certificate of convenience and necessity for the operation of an auto bus line over a route already served by a trolley line, should be granted where it appears that the service of the latter is inadequate to meet the needs of the public.

Decided May 6, 1920.

Appearances:

M. B. Hall, Vernon, attorney for the petitioner.

Kernan & Kernan (Gay H. Brown), Utica, attorneys for New York State Railways.

KELLOGG, Commissioner:

Consent to the operation of the auto bus line here under consideration has been granted by the cities of Oneida and Sherrill, through which it is proposed to be operated. It also passes through the town of Vernon, but that municipality has not brought itself within the provisions of section 26 of the Transportation Corporations Law.

The consents of the city authorities, as originally granted, both contained fare rate restrictions. The City of Oneida provided for a flat fare of ten cents per passenger, and the City of Sherrill fixed a maximum fare of a similar amount.

At a public hearing held, after due notice, on this application in the city of Oneida April 10, 1920, the attention of the petitioner was called by the sitting Commissioner to this objectionable feature of the consents seeking to abrogate or restrict the powers of this Commission in regard to charges for fare.

Accordingly both consents have been amended by proper municipal action so that the question of fare regulation is left to this Commission to exercise as it sees fit.

The counties of Madison and Oneida are separated by the waters of Oneida creek, flowing northerly into Oneida Lake. The City of Oneida is the most northeasterly political subdivision of the county of Madison. The adjacent municipalities to the east, across Oneida creek, in the county of Oneida, are, commencing at the north, the town of Verona, the town of Vernon, and the city of Sherrill. The southern part of the city of Oneida carries the local name of Kenwood.

Within the city of Sherrill there is the large plant of the Oneida Community, Ltd., manufacturing in very large volume table ware and game traps. In the Kenwood section of Oneida, about a mile and a half from the main factory, is situated the sales office of this corporation, and also a knife factory conducted by it.

There are about three thousand employees engaged in the various operations of this company, a number largely in excess of the living accommodations in the immediate vicinity. Many of the employees, therefore, about a thousand or twelve hundred in number, find their homes in the city of Oneida and other nearby communities farther to the west.

The New York, Ontario and Western railroad runs northerly through the city of Oneida, connecting the main part of the city with the Kenwood section, but its service is so infrequent, and its stations so far removed, that as a common carrier between the plants of the Oneida Community, Ltd., and the Oneida homes of its employees, it is negligible as a factor in the solution of the transportation problem.

This large body of non-resident employees is carried to and from its work principally by the cars of the New York State Railways. This company opposes the granting of the certificate applied for upon the broad ground that it will permit the operation of a parallel and competing line. This, of course, would be the result, and the only question to be determined is as to whether, under the conditions here

existing, a direct competing line by auto buses should be permitted to operate in a territory served by the trolley company.

The transportation of this large body of employees is necessarily a rush-hour business, although the hours have been somewhat varied, or as it is called "staggered," so that the commencement and completion of work of those employees in the various activities extends both at morning and at night over a period of several hours. But conditions are such that very inconvenient and dangerous crowding occurs, especially on the westward trips in the evening.

The New York State Railways operates through the streets of Oneida to the electrified line of the West Shore railroad, taking which it proceeds to Sherrill. Near the Sherrill station there is a branch line going to Kenwood, to take which it is necessary to change cars.

At Sherrill the railroad is at considerable elevation, and adjacent to the westbound tracks there is a station and platform with a small waiting room. This platform has been fenced in so as to protect crowds attempting to reach home from work at night, and on occasions as many as four or five hundred people are herded here attempting to take the cars.

Three or four cars are run together in trains, at intervals, at these times, and the railroad company undoubtedly does all it can to handle properly the unusual condition. But notwithstanding these efforts, this condition of close crowding necessarily exists, resulting in injuries, separation of families, and torn clothing. The cars are crowded so that those with a seating capacity of fifty-two are shown to have carried one hundred and thirty-five, and those of a seating capacity of seventy-five to carry three hundred.

The cars are jammed full, all that can get on hastening so to do in this dangerous and unsafe way, and those unable to accomplish the feat are obliged to wait until the next train. When the cars are late the crowding is intensified, and the situation is still worse; and in stormy and cold weather the

people have to stand on this elevated platform exposed to the elements with no adequate protection.

The connecting car to Kenwood is also overcrowded, many people preferring to walk, and indeed many times being obliged to for lack of accommodations.

This is a situation plainly where the industry has outgrown its present transportation facilities, and as above stated, it is in nowise the fault of the railroad company. The railroad company conceded the condition substantially as claimed, but places itself flatly on the position that competition should not be permitted as long as it is doing the best it can, because the automobile bus, while it may alleviate to a slight extent the congestion of rush hours, will be competing with it during the day when the conditions more nearly approach normal.

The evidence shows, however, that practically during the entire day there is a substantial travel, and taking the above situation into consideration, no doubt remains that additional service is a public need and will serve a public convenience. The principle that a common carrier should be protected from competition has often been applied by this Commission, and properly so. The application of that principle is one of our duties, but it does not extend so far as to require the denial of an application of a competing line for our certificate, where it plainly develops that the existing carrier can not, even through no fault of its own, adequately serve the traffic.

In the case before this Commission [*Matter of Ashmead*, 5 P. S. C., 2nd D., Reports 215] involving the operation of the jitneys in Rochester, Commissioner Emmet laid down the principle, which should be applied here, in the syllabus to his opinion written by himself, with that clarity which so eminently characterized all of his official writings, as follows:

"Whenever it shall appear to the satisfaction of the Commission that an electric railway can not, or will not, solve a local transportation problem satisfactorily, the Commission will be prepared to give consid-

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eration to applications looking to the establishment of alternative methods of transportation, *even though these involve direct competition with the electric railway.*"

The situation which Commissioner Emmet anticipated is now with us, and the rule he contended for should be applied.

There seems to be no suggestion that the New York State Railways does not adequately serve the local traffic in the main portion of the city of Oneida, and as to such service north of the line of the West Shore railroad it should be protected from competition. Upon the hearing the petitioner stated that he was willing to except this local service from his operations, which was intended to serve merely the inter-urban traffic.

A certificate of public convenience and necessity should therefore issue as applied for, under the amended consents of the respective municipalities, and under the usual conditions imposed by this Commission, but excluding the carriage of all passengers whose point of embarkation and debarkation shall both be within that portion of the city of Oneida north of the tracks of the West Shore railroad.

Chairman Hill and Commissioners Barhite and Van Namee concur; Commissioner Irvine not present.

In the Matter of the Complaint of ABRAM BAIRD, AS MAYOR OF GLOVERSVILLE, *against* A. S. BURLESON, POSTMASTER GENERAL, and GLEN TELEPHONE COMPANY as to proposed increase in rates, as to present rates, as to service. [Case No. 6689.]

Complaint of SUBSCRIBERS IN GLOVERSVILLE *against* A. S. BURLESON, POSTMASTER GENERAL, and GLEN TELEPHONE COMPANY as to rates and service. [Case No. 6690.]

Complaint of MAYOR AND COMMON COUNCIL OF JOHNSTOWN *against* A. S. BURLESON, POSTMASTER GENERAL, and GLEN TELEPHONE COMPANY as to proposed increase in rates, and as to service. [Case No. 6691.]

In the Matter of the Rate Schedules Filed by GLEN TELEPHONE COMPANY proposed to be effective January 1, 1919. A. S. Burleson, Postmaster General. Petition of company to file tariff of rates effective December 1, 1919. [Case No. 6700.]

Return: While in fixing rates for telephone service due regard must be had, among other things, to a reasonable average return upon the capital actually expended, etc., obviously regard must be had also to many other elements of service, and this is peculiarly true of telephone service which differs greatly from other public utilities in the number and relative weight of factors to be considered.

Rate: Where the average return for a five-year period is shown to have been about $7\frac{1}{2}$ per cent, including the final year at 8.99 per cent earned on the increased rates under consideration, but it appears that a recent wage increase will reduce the net income, and that large capital expenditure for a new telephone exchange is called for in the immediate future, the increased rates were sustained.

Depreciation: In a telephone plant which includes comparatively little underground cable, a composite percentage of 5.66 for annual depreciation held not unreasonable.

Decided May 6, 1920.

Appearances:

Wesley H. Maider, Corporation Counsel, for City of Gloversville.

Fred Linus Carroll for Glen Telephone Company.

Clarence W. Smith, Mayor, and *Borden D. Smith*, Corporation Counsel, for the City of Johnstown.

HILL, Chairman:

An order was made by this Commission in 1915, in rate cases known as Nos. 4176 and 4184, which order under section 97 of the Public Service Commissions Law determined the maximum rates to be charged by the Glen Telephone Company in the areas of Gloversville and Johnstown. On November 27, 1918, the Commission permitted the company to file an increased schedule of rates effective in said areas January 1, 1919, which in effect increased house lines 25 cents per month, business lines 50 cents per month, and intercity lines 50 cents per month. Thereafter complaints were filed on behalf of a number of thousands of subscribers in the city of Gloversville, and on or about December 27, 1918, the City of Gloversville made an application to this Commission to set aside its order of November 27, 1918, and to determine that said proposed increase in service rates claimed by the telephone company to be effectual January 1, 1919, should not be operative or effectual, upon various grounds; among others, that the provisions of the Public Service Commissions Law had not been complied with, in that notice had not been served upon the complainants in rate cases Nos. 4176 and 4184, or upon the subscribers of the Glen Telephone Company, and that the Commission had not made a determination upon the merits that the proposed increases were fair, just, and reasonable as provided by sections 22 and 97 of the Public Service Commissions Law. A hearing on this petition of the City of Gloversville was had December 27, 1918, and on that day the Commission made an order as follows:

Glen Telephone Company having filed with this Commission by special permission rate schedules hereinafter described, proposed to be effective January 1, 1919, and complaints relating to what are known

as the Gloversville and the Johnstown areas having been received as to increases in rates thereby proposed; and it appearing that the rates affecting the Gloversville and Johnstown areas have been subject of adjudication by this Commission by orders of this Commission of December 30, 1915, and March 1, 1916, in cases 4176 and 4184; and a hearing on said objections having been held by this Commission in the city of Albany on December 27, 1918, at which those named above appeared; and it appearing that under the specific wording of section 97 of the Public Service Commissions Law this Commission may consent that the increases in rates proposed may be made; and counsel for the company stating at the hearing that if the rates proposed are found, after investigation, to be unreasonable, the company will refund the difference to subscribers and will also assume the burden of proof as to the reasonableness of said rates in any proceeding thereon; now, after hearing counsel, and after due consideration had, and the Commission finding that it should properly allow to take effect January 1 the increases proposed, under the conditions hereinafter named, without, however, determining at this time said rates are just and reasonable, it is

Ordered: That Glen Telephone Company may, under the notice already given, put in effect in its Gloversville and Johnstown areas January 1, 1919, the rates, rentals, charges, rules, privileges, and facilities shown by its local general tariffs designated as Fifth Revision of P. S. C., N. Y., No. 8, and Fourth Revision of P. S. C., N. Y., No. 9, applying to Gloversville and Johnstown central office districts respectively, and which are now filed with this Commission, on the following conditions: That said rates, rentals, charges, rules, privileges, and facilities shall be the subject of investigation and determination by this Commission either in pending cases Nos. 6689, 6690, 6691, or other proceedings, and that in such proceeding or proceedings the burden of showing said rates, rentals, charges, rules, privileges, and facilities to be reasonable and otherwise in accord with law shall be upon Glen Telephone Company; and that until said investigation shall be completed and determination made by order of this Commission said Glen Telephone Company shall furnish bills to its subscribers for the service in the Gloversville and Johnstown areas, upon all of which bills, beginning with those rendered for January, 1919, shall be printed, stamped, or otherwise permanently indicating the promise of Glen Telephone Company to refund to the subscriber paying such bill the amount paid in excess of the rate or rates hereafter determined by this Commission, by order, to be reasonable.

The rates so inaugurated were as follows:

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Gloversville:

Direct line business rate increased from \$48 to \$54 per annum.

Alternate rate (intercity privilege) increased from \$90 to \$96 per annum.

Two-party line business rate increased from \$42 to \$48 per annum.

Direct line residence rate increased from \$30 to \$33 per annum.

Two-party line residence rate increased from \$24 to \$27 per annum.

Four-party line residence rate and multi-party rural rate increased from \$18 to \$21 per annum.

Johnstown:

Direct line business rate increased from \$42 to \$48 per annum.

Alternate rate (intercity privilege) increased from \$90 to \$96 per annum.

Two-party line business rate increased from \$36 to \$42 per annum.

Direct line residence rate increased from \$30 to \$33 per annum.

Two-party line residence rate increased from \$24 to \$27 per annum.

Four-party line residence and multi-party rural rate increased from \$18 to \$21 per annum.

Canada and Caroga Lakes:

Multi-party rural residence rate increased from \$18 to \$21 per annum.

Garoga Valley:

Multi-party rural rate increased from \$18 to \$21 per annum.

Canajoharie:

Direct line business rate increased from \$39 to \$42 per annum.

Two-party line business rate increased from \$30 to \$33 per annum.

Direct line residence rate increased from \$24 to \$27 per annum.

Four-party line residence and multi-party rural rate increased from \$18 to \$21 per annum.

Fort Plain:

Direct line business rate increased from \$39 to \$42 per annum.

Two-party line business rate increased from \$30 to \$33 per annum.

Direct line residence rate increased from \$24 to \$27 per annum.

Four-party line residence rate and multi-party rural rate increased from \$18 to \$21 per annum.

St. Johnsville:

Direct line business rate increased from \$39 to \$42 per annum.

Two-party line business rate increased from \$30 to \$33 per annum.

Direct line residence rate increased from \$24 to \$27 per annum.

Four-party line residence rate and multi-party rural rate increased from \$18 to \$21 per annum.

Bleecker:

Multi-party rural rate increased from \$18 to \$21 per annum.

At the date of that order the Federal wire bill was in effect, authorizing the President of the United States to assume possession, control, and operation of all telegraph and telephone wires, and the United States Supreme Court has held that control and operation by the President under the provisions of that statute had the effect of ousting the Commission of its power over rates.

It appears that the Postmaster General, as the President's agent, had at the time assumed possession, control, and operation of the Glen Telephone Company, and authorized that company to proceed to increase its rates in the sums above stated by procedure before this Commission. At that juncture considerable uncertainty existed as to the relative power of the federal and state agencies, and it was probably with a view to conciliating the state authorities that this procedure was taken. The complainants insisted that the proposed increases were unjust and unreasonable, and opposed them. The case proceeded to hearing upon the complaints, and was pending when the so called wire return bill was enacted by the Congress, the effect of which was to return the telegraph and telephone properties to their owners on August 1, 1919, with the proviso that rates established by the Postmaster General during his control should remain in effect for a period of four months after that date unless sooner modified by the state commissions.

On September 15, 1919, the Glen Telephone Company applied to the Commission for leave to put the foregoing rates into effect on December 1, 1919, they being already in effect under the previous order; and after notice and a hearing, such application was granted by order dated November 25, 1919, upon condition that such rates should not be considered to be approved by the Commission, but should be subject as to their justness and reasonableness to determination by it, which determination will be made by the order to be entered herein.

Among other contentions on the part of the City of Gloversville was a claim that the rates in that city should be determined upon a consideration of the Gloversville plant and business considered separately from the property devoted to public use and business done by the respondent in the remainder of its territory. The total area of the territory of central office districts served by the company is 942½ square miles, with a population in those districts of something like 68,000. In 1915 the number of stations in cities and villages was 6106, and in rural territory 1239, and there have not since been any change in population or in relative urban and rural business which it is necessary to consider. The following schedule was referred to in the former rate cases, and is repeated here for the purpose of indicating the population, area, and number of stations in the respective central office districts:

	<i>Population, 1910</i>	<i>Area square miles</i>	<i>Stations</i>
Bleecker Mountain	477	68½	83
Broadalbin	3,296	96	139
Canada and Caroga Lakes.....	855	40	18
Canajoharie	4,232	64	513
Fonda	4,493	52	364
Fort Plain	6,839	94	575
Garoga Valley	632	35	22
Glen	2,721	80	184
Gloversville	22,323	86	3,864
Johnstown	11,540	42	1,527
Mayfield	1,028	28	14
Northville	4,786	238	215
St. Johnsville.....	5,471	84	337

In those cases it was found that the receipts of the company in the Gloversville and Johnstown districts were about 75 per cent of the total gross receipts from all districts, and that its gross receipts per station in those cities were higher than in the generality of the other central office districts. It was also found that while the great bulk of the investment was in the Johnstown and Gloversville districts, the operating revenue in the other communities compared favorably with those districts in proportion to the stations installed, and the Commission came to the conclusion that the subscribers in Johnstown and Gloversville were not being charged unreasonably high rates in order to make up for

losses in the remainder of the territory. No change in the situation has occurred since the former determination which creates any substantial difference in this respect, and the variations in the new schedule are in substantial accord with those there considered. The area covered by the business of the company is a territory generally thirty-four miles in length and twenty-eight in width, the various exchanges being interconnected by toll lines which form part of the company's system and are so operated.

It appears fair to deduce from the testimony of both Witbeck, the complainants' expert, and of Green, an official of the company, that of the \$226,949 gross exchange revenues for the year 1918, a little less than half came from the Gloversville exchange, crediting that exchange with the toll revenue originating therein, and somewhat more than half if it is credited with half of the company's total toll revenues. The Johnstown exchange comprises about half the number of stations included in the Gloversville exchange and produces a proportionate revenue. The apportionment of toll revenues as between exchanges is a matter of equitable allocation which is arrived at in various ways, but in view of the foregoing statement it seems unnecessary to give it further consideration in this case, because on no basis would Gloversville be entitled to more than half thereof. Thus it is seen that Johnstown and Gloversville, with substantially 75 per cent of the stations in the system, yield about a proportionate part of the total revenue. It is noticeable also that this percentage compares very closely with the percentage of the increase in revenues of the entire system under the new rates attributable to those exchanges, as shown by respondent's exhibit 2, of March 11, 1920, the latter being about 80 per cent.

As between Johnstown and Gloversville, it seems unnecessary to make a comparison of property valuations. The two cities form a continuous community, although composing separate exchange areas and central office equipment; and

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although the toll line exchange lies in the Johnstown district, the property comprising the same would require allocation in case an inventory and appraisal were to be made. As stated, the exchange service for the two districts is distinct, the number of subscribers connected with the Johnstown exchange being approximately 50 per cent of the number connected with the Gloversville exchange, the character of the service in other respects being similar. This difference in the number of subscribers attached to the two exchanges accounts for the difference in rates between them. This difference is \$54 for direct line business service in Gloversville as compared with \$48 in Johnstown, with other variations in substantial proportion.

While in fixing rates due regard must be had among other things to a reasonable average return upon capital actually expended, etc., obviously regard must also be had to many other elements of the service. This is peculiarly true of telephone service, which differs greatly in the number and weight of factors to be considered in making rates from other public utilities, and even then the making of the rates is far from being an exact science. It is well known that as a general rule both the cost and the value of exchange service are much enhanced as the number of subscribers connected with the exchange increases, and this factor is accordingly of great importance. It is also essential, in a group of exchanges like that now under consideration, that some regard shall be paid to the value as distinguished from the cost of service in some of the smaller exchanges, and with respect to certain of the rates included in the classifications in all the exchanges. To be sure this ought not to be carried to the extent of disregarding the element of cost. The company's witness, Green, stated that the varying rates for the different communities were not based mainly on the value of the service received by the subscriber, but upon the value of the service rendered by the company, keeping in view also the commercial, industrial, and civic conditions and

every element deemed to have a bearing upon the various rates. While this language is somewhat general, still we think it covers as well as it is practicable so to do the principles which are applied in the making of all telephone rates.

In view of the facts stated and of the results reached in the previous case, it would seem that sufficient regard has been had to the requirements of the statute in the respect referred to, and that the precedent established in the former case, wherein the respondent's territory was treated as an entirety, may be adhered to without resulting injustice to the exchange subscribers in Johnstown and Gloversville; and similarly that the precedent there established as to the reasonableness of the variations in the rates in the various exchanges, with which variations the new rates are in substantial harmony, may also be followed.

CONSIDERATION OF DEPRECIATION

The scale of percentages adopted by the company for the computation of depreciation of different classes of property is as follows:

Right of way, 00; Land (buildings), 4; Central office equipment, 7.5; Station apparatus, 8.3; Private branch exchange, 10; Booths, 10; Exchange pole lines, 7.3; Exchange aerial cable, 5.8; Exchange aerial wire, 8; U. G. conduit, 2; U. G. cable, 3; Toll pole lines, 6.3; Toll aerial wire, 7; Office furniture and fixtures, 10; General tools and implements, 20.

Computations made by estimating the comparative proportions of these various elements on the basis of the depreciation charge for 1919 (\$44,474.23) indicate a composite percentage depreciation of 5.66 per cent. Considering the general character of the property, there being comparatively little underground cable, and judging by standards which the Commission has considered fair with other companies, this does not seem unduly high, provided the percentage be computed on the original cost. The following table shows this comparison:

Comparison of Maintenance Expenses of Class A B Telephone Companies (those with revenues of over \$50,000 per year), as shown in their annual reports to the Public Service Commission for 1919, including toll revenues.

Corporation	Operating revenue <i>Dollars</i>	Maintenance, excluding depreciation		Depreciation		Maintenance and depreciation	
		Amount <i>Dollars</i>	% of revenue	Amount <i>Dollars</i>	% of revenue	Amount <i>Dollars</i>	% of revenue
New York ¹	72,535,573	9,352,547	12.89	11,201,135	15.44	20,553,682	28.34
Rochester.....	633,494	137,773	21.75	69,284	10.94	207,057	32.68
Mountain Home.....	493,458	91,052	18.45	76,190	15.44	167,242	33.89
Wayne.....	163,914	24,678	15.06	28,000	17.08	52,678	32.14
Janestown ²	147,884	30,337	20.51	31,011	20.97	61,348	41.48
Osego and Delaware.....	145,094	27,034	18.63	20,000	13.73	47,034	32.41
Black River.....	140,519	20,905	14.87	23,100	16.44	44,006	31.32
Granville.....	100,984	13,297	13.16	16,258	16.09	29,555	29.27
Allegheny County.....	91,950	17,653	19.19	10,800	11.74	28,453	30.94
Friendship.....	8,235	1,679	20.39	900	10.93	2,579	31.32
Union (Olean Ex.) ³	880	39,452	46.02	.....	.....	405	46.02
Glen.....	263,998	39,452	14.93	44,474	16.82	83,926	31.75

¹ After deducting \$3,230,345 "license revenue".

² Covers eight months, May 1 to December 31, 1919.

³ Covers period January 1 to April 15, 1919.

This, however, is not the case. An official of the company testified that in computing the annual depreciation the value is computed, not on the book cost, but on an estimated reconstruction cost. The more usual method is to adopt as the retirement loss the difference between the original cost and the salvage value. If prices remain constant, the original and reconstruction costs agree and no question arises; but with replacement costs estimated to be in excess of original costs, as is here the case, the annual depreciation charge will be higher in a period of rising prices than under the usual method above referred to, while the depreciation fund will be larger and the resulting rate base correspondingly less. The result upon the rate should be approximately the same on either basis. The effect on the income statement, however, is that the charge in the operating expenses for depreciation is enlarged and the apparent income reduced. This is not the method contemplated in the Commission's accounting classifications, and we consider it objectionable in that it does not apportion the retirement loss equitably as between the present and future users of the service, and introduces an additional element of conjecture by requiring an estimate of future replacement cost as well as of probable life in service.

Correcting the depreciation for 1919 in the light of this criticism, we find an excess in the charge amounting to \$2040.

In this connection it is necessary to consider a feature of the former rate cases which has been referred to in this case by the respective counsel. The subject is sufficiently explained by the following quotation from the opinion of Commissioner Carr:

For the reasons herein set forth we are of the opinion that no allowance should be made in this case for the claimed deficiency in earnings for the purpose of providing for depreciation during the years 1901 to 1908 inclusive, amounting to \$115,763. The company has admitted and in fact claims that it should have a depreciation reserve of this amount for the years in question. Upon that basis it seems fair that the stockholders should eventually provide for this

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deficiency rather than the public. This can be done in any way which may suit the stockholders, either by contributing new capital for replacements or by decreasing their rate of dividends for a period of years and devoting a portion of the surplus earnings toward the creation of this reserve. In view of the past history of the company it would not seem as though this was an unreasonable thing to expect of the stockholders or that they would be unfairly treated by requiring this to be done.

Complainant's counsel, in his brief, after quoting from the opinion as above, says:

We therefore must come to the conclusion that the finding of the Commission of value was upon the express condition that the stockholders should provide for a deficiency in the depreciation reserve of approximately \$128,000; that without this condition being complied with by the Glen Telephone Company it would not be in a position to ask for further relief of this Commission . . . It has not complied with the condition specified by the Commission in this opinion.

Of the amount mentioned, \$12,353 was allowed by Commissioner Carr, reducing the item under consideration to \$115,763. This item of \$115,763 consisted of estimated depreciation which the Commission held must *eventually* be borne by the stockholders. It does not represent realized but theoretical depreciation. If we consider the disposition which the Commission made of this item in connection with provisions of the Commission's Uniform System of Accounts, it will appear why the amount was left to be eventually made good by the stockholders instead of being deducted from the fixed capital.

Those provisions require that as tangible fixed capital acquired prior to January 1, 1913, is withdrawn or retired from service, the amount at which it stands charged shall be credited to fixed capital installed prior to January 1, 1913, and such amount plus the expenses incident to the retirement, less the value of salvage, shall be charged to reserve for accrued depreciation for the proportion applicable to the period covered by the reserve, and to an account entitled Realized Depreciation not Covered by Reserves for the remainder, and such portion only of the realized depre-

ciation shall be charged to the former account as is due to life in service during the period for which the reserve is established.

The effect of this accounting formula is to charge against surplus, *i. e.* to deduct from the amount that would otherwise be available for dividends, the realized depreciation, as fast as it is determined by the necessity for retiring and replacing portions of plant and equipment, which has not been provided for in advance by the accumulation of an adequate reserve. In other words, the mechanism thus furnished for the treatment of retirements, by charging to the fund out of which dividends are paid all depreciation against which no adequate reserve has been provided, when applied to the depreciation which we are now considering, would ordinarily produce the precise result which the Commission designed, namely, that the unprovided for depreciation estimated in Commissioner Carr's opinion at \$115,763 should, to the extent that the estimate should prove to be correct, automatically be eventually borne by the stockholders instead of by the public. If, on the other hand, the Commission had attempted to reach the same result by deducting the entire sum from the fixed capital account at that time, injustice could have been expected to result either to the company or to the public to the extent that the actual or realized depreciation should ultimately prove to be greater or less than the estimated or theoretical depreciation.

We must now, however, consider the testimony of the witness Green to the effect that the depreciation reserve set up since 1914 has been sufficient to cover some of the depreciation prior to 1914. He first stated that all of the prior depreciation had been thus absorbed, but later qualified this statement by saying that it had not been covered in its entirety.

If it be true that the depreciation reserve existing today is sufficient to cover all or part of the depreciation that should have been chargeable to the period prior to 1908,

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then either the charges for depreciation since 1914 have been excessive or the company's estimate of theoretical depreciation prior to 1908 must have been so. If we accept the first of these conclusions, it would appear that the company has either altogether or to some degree evaded the determination of the Commission in the earlier case above quoted. But we have already seen that, judged by standards which the Commission has accepted or recommended in the case of other telephone companies, the annual depreciation charges for the past six years do not appear excessive, all of which would seem to indicate that the company's estimate for accrued depreciation in the earlier rate cases was too high. In any event, the Glen Telephone Company is not relieved of the necessity for charging to surplus (*i. e.* against the stockholders instead of against the public) the actual loss, if any, suffered as property is retired which was in service prior to 1908. It is still bound by Commissioner Carr's opinion already quoted, and by the language of the prescribed Uniform System of Accounts, to charge against the depreciation reserve only so much of the depreciation actually realized when retirements are made as is covered by depreciation accrued and set up on its books since 1908. The remainder of such retirement losses must go toward reducing the amount that would otherwise be available for dividends.

VALUE OF THE PROPERTY USED IN THE PUBLIC SERVICE

The disposition of the case largely turns upon a determination of the amount upon which the rate of return is to be computed, and this was the principal question litigated upon the hearings, expert testimony being adduced by the respective parties.

This same question was, however, very fully litigated in two previous cases before this Commission [Nos. 4176 and 4184], *Matter of Edwards et al. v. Glen Telephone Company*, IV P. S. C., 2nd D., 712. In those cases the Commission made a determination of the value of the company's property used in the public service as of June 30, 1914, the

amount, including working capital, being fixed therein, as stated in the opinion of Commissioner Carr, at \$584,961. Upon the hearings in the present case, the sitting Commissioner announced that the determination as to present value would be arrived at by accepting the figures formerly arrived at, as of the earlier date, and bringing the property account down to the present time by adding to or deducting from the sum then ascertained. In the meantime, the property and depreciation of the company have been the subject of very full and complete examination by the Commission's division of capitalization in various intervening proceedings, and it would seem that the results secured in these cases, based as largely as possible on the original book entries, furnish the fairest guide for the determination of a valuation in this proceeding. Where detailed actual costs of recent dates can thus be secured, they are in my opinion far more reliable than any speculative or theoretical computations based upon estimates of reproduction costs. We have, therefore, arrived at a valuation as of September 30, 1919, in the following manner:

*Analysis of valuations as of June 30, 1914, and
September 30, 1919:*

The Commission, in its opinion dated December 30, 1915 [cases Nos. 4176 and 4184], in determining the value of the respondent's property at June 30, 1914, to be the sum of \$584,961, accepted the following items:

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Fixed capital of the company according to its books and as set forth in its exhibit No. 50, was.....	\$534,412.59
Its working capital, as per company's books.....	36,232.11
Allowances for deficit during construction for the year 1899 (Commission's exhibit No. 2).....	1,963.00
And for deficiency of return necessary to provide for depreciation during the years 1909 to 1914 inclusive, the sum of.....	12,353.00
Making a total valuation of.....	<u>\$584,960.70</u>
During the period from July 1, 1914, to September 30, 1919, the company made net additions to its fixed capital accounts (taking into account adjustments as shown in the Commission's final report dated September 25, 1919) of.....	\$178,605.50
The allowance for working capital based upon the current assets of the company at September 30, 1919, is \$57,067.99, or an increase of.....	<u>20,835.88</u>
	<u>\$199,441.38</u>
Accrued depreciation as reported by the company at September 30, 1919, amounting to.....	<u>137,241.26</u>
The changes in the valuation of the property of the company during the period from July 1, 1914, to September 30, 1919, results in a net addition of.....	<u>62,200.12</u>
Making a total valuation at September 30, 1919, of.....	<u>\$647,160.82</u>

Note: The allowances for deficit during construction, 1899, and deficiency of return 1909 to 1914 inclusive, made by the Commission in the previous rate case, have been accepted in the present case.

The detail of the working capital is shown in the following. The allowance for working capital is based upon the company's reported balance sheet at September 30, 1919, and consists of the following items:

Cash.....	\$2,389.62
Employees' working fund.....	516.00
Materials and supplies.....	41,877.65
Accounts receivable.....	<u>12,285.72</u>
Total.....	<u>\$57,067.99</u>

The sum allowed for accounts receivable was determined as follows:

Accounts receivable, due from subscribers.....	\$35,984.88
Accounts receivable, miscellaneous.....	<u>886.35</u>
	<u>\$36,871.23</u>
Less:	
Audited vouchers and wages unpaid.....	\$3,642.67
Subscribers' deposits.....	25.00
Accounts payable to system corporations....	3,447.38
Service billed in advance, rental.....	17,865.92
Service billed in advance, miscellaneous....	<u>104.54</u>
	<u>\$24,585.51</u>
	<u>\$12,285.72</u>

The corporate income account for a period of years, including the year 1919 at the new rates, as reported to the Commission, is as follows:

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Item	For year ended Dec. 31, 1914	For year ended Dec. 31, 1915	For year ended Dec. 31, 1916	For year ended Dec. 31, 1917	For year ended Dec. 31, 1918, at old rates	For year ended Dec. 31, 1919, at new rates
	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars
Operating revenues:						
Exchange service.....	153,373.28	154,202.87	169,308.43	185,186.29	185,953.79	213,000.43
Toll service.....	25,263.99	28,455.77	33,430.22	37,549.43	39,245.83	48,654.36
Miscellaneous operating.....	304.00	437.89	1,791.88	1,883.31	1,750.32	2,343.29
Total operating revenues.....	179,941.27	183,176.53	204,530.53	224,619.03	226,949.93	263,998.08
Operating expenses:						
Maintenance.....	56,135.64	54,416.97	68,979.70	78,544.10	81,856.81	83,925.84
Traffic.....	42,415.94	38,591.62	42,718.14	49,016.28	51,658.96	63,032.30
Commercial.....	14,960.00	13,673.25	14,847.76	18,531.99	20,617.68	19,978.12
General and miscellaneous.....	22,016.63	22,235.51	23,183.95	22,209.15	22,346.25	24,587.57
Total operating expenses.....	135,528.21	128,917.35	149,729.55	168,301.52	176,479.60	191,523.83
Net operating revenue.....	43,403.06	54,259.18	54,800.98	56,317.51	50,470.33	72,474.25
Other operating revenues.....	.....	.....	.....	.....	.....	.....
Other operating expenses.....	.....	.....	.....	.....	.....	.....
Uncollectible operating revenues.....	1,042.24	1,095.46	1,035.48	1,194.58	1,024.56	1,743.02
Taxes assignable to operations.....	7,061.46	7,253.58	12,928.43	11,567.83	12,855.09	15,780.05
Operating income.....	35,299.36	45,910.14	40,837.07	43,555.10	36,560.68	54,931.18
Non-operating revenues.....	335.63	228.40	209.68	474.96	1,184.54	1,121.71
Non-operating revenues deductions.....	161.18	166.57	150.29	173.87	72.01	23.46
Non-operating income.....	174.45	61.83	59.39	301.09	1,112.53	1,098.25
Gross income.....	35,473.81	45,971.97	40,896.46	43,856.19	37,673.21	56,049.43
Deductions from gross income.....	.....	.....	.....	.....	.....	.....
Rent deductions for lease of telephone plant.....	180.00	72.00	.....	.....	.....	1,289.24
Rent deductions for telephone offices.....	689.15	1,047.64	1,099.84	1,221.84	1,276.84	1,688.04
Rent deductions for conduits, poles, etc.....	651.77	680.91	634.37	601.08	620.55	654.50
Interest deductions for funded debt.....	12,000.00	12,000.00	12,000.00	12,000.00	12,000.00	12,000.00
Other interest deductions.....	576.51	995.33	1,973.23	4,986.29	5,708.37	142.25
Total deductions from gross income.....	14,846.43	14,745.88	15,677.44	18,719.21	19,605.76	14,244.13
Net income.....	21,127.38	31,226.09	25,219.02	25,136.98	18,067.45	41,805.30
Disposition of net income:						
Dividend appropriation of income.....	18,000.00	24,000.00	24,000.00	24,000.00	18,067.45	32,000.00
Miscellaneous appropriation of income.....	86.51	.....	.....	.....	.....	.....
Total charges to net corporate income.....	18,086.51	24,000.00	24,000.00	24,000.00	18,067.45	32,000.00
Income balance transferred to corporate surplus.....	3,040.87	7,226.09	1,219.02	1,136.98	.....	9,805.30

The important item in this statement is the figure \$56,049.43, representing the gross income for the calendar year 1919, during all of which year the new rates which are the subject of complaint were in effect. Adding to this the sum which we have found should be deducted from the accrual for this year to depreciation reserve, namely \$2040, we get as a corrected gross income for the year \$58,089.43; and applying this sum to the \$647,160.82 representing the amount upon which return should be computed, we find a rate of return equal to 8.99 per cent. In the former case, the rate of return was computed upon what was termed the "stockholders' equity," and adapting these figures to that method we get the following result:

Bond interest, \$200,000 @ 6%.....	\$12,000.00
Other income deductions as above.....	2,244.13
Stockholders' equity, \$447,160.82, return computed at 8%..	35,772.86
Excess	8,072.44
	<hr/> \$58,089.43

The average for the five years would be considerably less, and within a fraction of $7\frac{1}{2}$ per cent.

While on this showing, without considering the future, the Commission might properly order a trifling reduction in rates, it does not feel inclined so to do in view of certain other circumstances which exist. Thus, since 1919 a wage increase of approximately \$20,000 per year has been put into effect, and it is not believed that more than half of this sum can be offset by increased income. It also appears that the company is now called on to make extensive additions and improvements in its plant, especially in Gloversville, which will require a large additional capital outlay, estimated at \$150,000. The bulk of this expenditure is required for a new central office equipment in a new building; and while this improvement is desirable and will add to the efficiency of the service, it is not of such a character as will tend to bring about a proportionate increase in revenue. Another consideration is the demand for increased freight rates and the rising prices of materials. Some evidence was

given on the part of complainant tending to show that costs of operation, including wages and materials, were showing a tendency to decline. The Commission would be glad to be convinced that this is true, and while no doubt the claim was advanced in good faith, all facts go to prove that up to the present at least such costs show no diminution but still continue to advance.

Under the circumstances, we think it would be a mistake to insist upon the irreducible minimum of return for the immediate period. Under the statute the corporation is entitled to a reasonable return and also to reasonable provision for surplus and contingencies. Fortunately, the determination of rates by the Commission is not in the nature of a final judgment but is subject to periodical revision, and if a forecast of conditions is found on experience to be at fault, rates based thereon can be readily revised on complaint.

I think the rates in question should be allowed to stand until changed or abrogated by order of the Commission.

Commissioners Barhite and Van Namee concur; Commissioner Kellogg concurs in the result; Commissioner Irvine not present.

KELLOGG, Commissioner:

In these proceedings the reasonableness of local exchange rates in the cities of Gloversville and Johnstown is challenged.

The reasonableness of such rates should be determined upon the investment, the revenues, and the cost of rendering the service for which such rates are charged. The amount to be charged for such local exchange service should not be increased or diminished by conditions existing in other localities. Therefore I do not concur in the suggestion that the system should be treated as a whole in determining the proper rates for strictly local business.

However, as it appears that these vital factors do not

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materially differ in Johnstown and Gloversville from the other localities in the system, I believe that computations applicable to the system as a whole can be safely relied upon in determining the rates to be charged for local service in the cities affected.

I concur in result.

In the Matter of the Petition of the MAYOR AND COMMON COUNCIL OF THE CITY OF YONKERS and THE NEW YORK CENTRAL RAILROAD COMPANY, joined, under section 62 of the Railroad Law as to crossings of streets and avenues by said company's railroad in said city. [G. C. No. 533.]

Interest, payment of, in grade elimination cases:

In a case of a grade elimination, in computing the share to be paid by the city and the railroad companies involved, each party is entitled to interest on all sums paid out by it, respectively, from the time of payment to the time of accounting; and in case of delay beyond that necessarily incident to the payment of public moneys, the party in whose favor a balance exists is entitled to interest on the balance due until payment is actually made.

A party to the action should not be allowed to benefit in the way of non-payment of interest when an accounting is delayed by reason of its own lack of diligence in closing the matter.

Amount due from City of Yonkers to The New York Central Railroad Company in this grade elimination computed.

Decided May 11, 1920.

Appearances:

George H. Walker, Grand Central Terminal, New York city, for The New York Central Railroad Company.

Thomas M. Smith, Yonkers, Assistant Corporation Counsel, for the City of Yonkers.

VAN NAMEE, Commissioner:

All questions involved in this proceeding have been settled between the parties concerned except the question as to whether the City of Yonkers should pay interest on the amount due for the city's share of the elimination, and if so, on what amount and from what date.

On September 11, 1906, the Board of Railroad Commissioners made an order based on the joint petition of the Mayor and the Common Council of the City of Yonkers and the New York Central Railroad with reference to the elimination of certain grade crossings within that city.

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This order contained the express statement that the State should pay but \$138,000 of the total cost of the elimination as its proportion of the project. In the determination the following sentence occurs:

This Board also hereby determines that the State shall pay but \$138,000 of the cost of this work under this determination, this sum of \$138,000 to be the amount in full that the State shall pay as its proportion of the cost of changing said crossings under this determination.

At about the same time the New York Central entered into a contract with the City of Yonkers which contained the following clause:

It is understood and agreed between the parties hereto that the City of Yonkers shall pay 25 per cent of the legal cost (to be ascertained, determined and fixed solely in the manner provided by the statutes relating to the elimination of grade crossings in the State of New York) of the elimination of the grade crossings, shown upon said map and profile, of the tracks of the New York Central and Hudson River Railroad existing on March 1, 1904, upon the right of way of said company as it existed on that date in the manner illustrated on said map and profile, including the cost of all necessary work incidental thereto, upon the understanding and agreement, however, that the total cost to the City of Yonkers of its share for the *physical construction required to carry out said plans shall not exceed the sum of \$138,000, and that no* part of the difference between the said sum of \$138,000 (or other less sum as above ascertained) and the cost of the physical construction required to carry out the entire plans in the manner illustrated upon said map and profile, including the construction of a new fourth track and new industrial track, shall be borne or paid by the City of Yonkers.

The share to be paid by the city being by this agreement indefinite, an accounting between the parties was required to fix the amount due.

On December 10, 1913, the Commission approved the work as completed and notified the railroad company on December 18, 1913, of its approval and that it desired the accounting papers to be presented as promptly as possible.

After much discussion, and on August 20, 1915, the chief

engineer submitted a final accounting in the Yonkers matter, including expenditures up to August 1, 1915, indicating a total of \$1,950,607.43. This letter included the statement that duplicate copies had on that date been forwarded to the then Mayor of the City of Yonkers. On September 14, 1915, the Commission wrote the Mayor of the City of Yonkers advising him that the accounting papers had been submitted to the city authorities, and that the Commission desired the accounting brought to a conclusion at the earliest possible moment; that interest had been included up to August 1, 1915, and that the Commission would not sanction any further advance in the interest date. I take it that this meant that interest had been computed from the time the actual expenditures were made by the railroad company up to August 1, 1915, and also interest on the expenditures of the city for land and rights of way from the time those expenditures had been made.

On the accounting submitted to the Commission on August 20, 1915, there was shown a balance due by the City of Yonkers to the railroad company of \$129,917.98. This figure was reached by adding to the \$138,000 agreed upon as being the limit of the share of the City of Yonkers for the physical construction plus one-quarter of the cost of land and damages and legal expenses according to the agreement, or \$62,481.25, making a total due from the City of Yonkers of \$200,481.25 less the amount paid by the City of Yonkers of \$70,563.27, which leaves the balance of \$129,917.98.

The engineers of the Commission checked up and examined the expenditures of the elimination until an amount equal to four times \$138,000 had been checked up and approved. It was not considered necessary to check up the whole items of expenditures amounting to \$1,950,607.43 because the State's obligation was by the agreement limited to \$138,000.

Thus the matter stood when on September 14, 1915, a letter was written by the Commission to the Mayor of the

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City of Yonkers. In the letter the Mayor was asked to advise what progress the city had made in examining the accounting and when it would be ready either to reject or accept it. I am unable to find any reply to this letter.

On December 28, 1915, the Commission by order approved the accounting in so far as the Commission was concerned, and a check for \$138,000 was sent to the railroad company in full payment of the State's share of the elimination. The order approving the accounting, so far as the State was concerned, contains no reference to the amount due between the City of Yonkers and the Central railroad, nor are there any papers before the Commission showing that the City of Yonkers ever formally accepted the statement of the accounting filed with the city by the railroad company as indicated by the letter of the railroad company. Nowhere does it appear that the City of Yonkers ever accepted finally the accounting of the railroad company, although it is shown that on October 23, 1914, over a year before the settlement by the State of the State's share with the railroad company, the Commission notified the railroad that on October 21st it had considered the matter of the elimination in Yonkers, and that it desired a sworn statement from the railroad company showing an expenditure of at least \$552,000, if that amount had been expended, this being four times the amount which the State was to pay. On November 6, 1914, the railroad company was notified that it should include all land and damage expenses in the accounting. On December 1, 1914, the railroad submitted a partial accounting amounting to \$520,157.80, which did not include any land damages, interest, or general charges. On December 16, 1914, the city engineer of Yonkers wrote the Commission that he had examined this partial accounting and that he saw no objection on the part of the city to the Commission paying its share; that he had obtained a general idea of the statement and that so far as could be ascertained there was no objection to it. However, he

desired it to be understood that if the State made its payment it in no way obligated the City of Yonkers, and that it reserved the right to wait until the final accounting before paying its share.

From December 28, 1915, until early in 1919 much correspondence passed between the parties, but nowhere does it appear that they met and agreed upon an accounting or that a definite sum was agreed upon as owing from the city to the railroad company.

On June 5, 1919, the railroad company filed a statement of additional accounting with the city and asked that a hearing be held by the Commission.

At the hearing on July 16, 1919, held by Commissioners Fennell and Kellogg, the figures of the company on final balance showed the sum of \$143,949.08 as due from the city to the railroad on June 1, 1919. This amount is arrived at as follows:

Amount by agreement due from the city for physical construction	\$188,000.00
Interest on this amount from August 1, 1915, the date of the so called intermediate accounting, to June 1, 1919.....	81,740.00
Share of the city for legal expenses and acquiring property as agreed, with interest including accrual of interest from the date of payment.....	78,720.84
Total	\$248,460.84
Expended by the city to June 1, 1919, under the terms of the agreement, including accrual of interest from the date of payment	104,511.76
Balance claimed by the railroad.....	\$143,949.08

This balance was agreed upon by both parties except the item of interest amounting to \$31,740, leaving a balance of \$112,209.08 (minutes of the hearing of July 16, 1919, page 21).

The question of interest involved here is one of law and not a matter for the legislative or administrative determination of the Commission. The company and the city are entitled to interest on all sums paid out by them respectively from the time of payment to the time of accounting, and in case of delay beyond that necessarily incident to the payment of public moneys, the railroad is entitled to

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interest on the balance due until payment is actually made. The interest is a part of the cost or expense of the work, and where the accounting is delayed by reason of mutual mistakes, there is no reason why it should not be allowed (*Matter of Petition of State Commission of Highways*, 182 A.D. 108). The railroad appears here to have proceeded with due diligence, and the city must be held to have had notice in August and September, 1915, that the amount expended by the railroad was far in excess of \$552,000, or four times the sum of \$138,000, the amount agreed upon as the limit of its share of the physical construction. It is reasonable to allow the city a short period to examine and accept the accounting, but it should not be entitled to benefit by its own lack of diligence in closing the matter. The State made its settlement on December 28, 1915. Treating both city and state alike on the question of interest, that date may fairly be taken as one from which interest should begin to run on the item of \$138,000. It would therefore seem that the railroad company is entitled to interest from December 28, 1915, to the date of final accounting by the parties. The date of the final hearing, July 16, 1919, may be fairly set as the first date the minds of the parties agreed as to the final figures of the accounting. Then figures were agreed upon as of June 1, 1919. Therefore, allowing interest on the item of \$138,000 from December 28, 1915, to June 1, 1919, of \$28,332.72, and adding to that the figures agreed by both without interest on the \$138,000 item of \$112,209.08, a total of \$140,541.80 is found to be due the railroad company from the city as of June 1, 1919, on which it is entitled to interest until the date of final payment.

An order has been drawn declaring the sum of \$140,541.80 as due from the City of Yonkers to The New York Central Railroad Company on June 1, 1919, in full and final settlement of all claims relating to the elimination involved in this case.

All concur.

Petition of GEORGE E. LATHAM under chapter 667, laws of 1915, for a certificate of public convenience and necessity for the operation of a stage route by auto buses in the city of Saratoga Springs, it being proposed that the route shall also be operated to the incorporated village of Lake George. [Case No. 7406.]

Operation of an auto bus line should be permitted over a route, a portion of which is already served by another line, where it appears that the operation of the proposed route will not seriously affect the established line and will serve a substantial population not accommodated by the latter.

Decided May 11, 1920.

Appearances:

Brckett, Todd, Wheat & Wait (by William E. Benton), Saratoga Springs, for petitioner; also *George E. Latham*, petitioner, in person.

Slade, Harrington & Goldsmith (by John E. Slade), Citizens' Bank Building, Saratoga Springs, for Claude L. Scott.

Chambers & Finn (by Walter A. Chambers), Glens Falls, for Benjamin F. Ogden.

Lawrence K. McKelvey, Saratoga Springs, for The Delaware and Hudson Company.

James McPhillips, Glens Falls, for the Hudson Valley Railway Company.

KELLOGG, Commissioner:

This Commission is petitioned to grant, pursuant to section 25 of the Transportation Corporations Law, a certificate of public convenience and necessity for the operation of a bus line from the station of the Hudson Valley Railway Company in Saratoga Springs, through Corinth, Hadley, and Luzerne to the village of Lake George.

The entire route is about thirty miles in length. The

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village of Corinth is about fifteen miles northerly of Saratoga Springs. Hadley and Luzerne are contiguous, separated only by the there narrow stream of the Hudson river, and about five miles northerly from Corinth. Lake George is about ten miles northeasterly from Luzerne.

An auto bus line is now being operated from Saratoga Springs as far north as Corinth, thence diverging westerly to the nearby settlement known as Palmer, under a certificate lately granted in case No. 7301 to Claude L. Scott. Mr. Scott is a successor to the property rights and interests of previous certificate holders who had operated this line for several years.

From Corinth northerly through Luzerne, northeasterly to Lake George, and thence southerly to Glens Falls, there is an auto bus line now operated by one Benjamin F. Ogden.

Transportation service between Saratoga Springs and Lake George is also furnished by The Delaware and Hudson Company's steam railroad, and by the Hudson Valley Company's trolley line. These routes, however, run much farther to the east, passing through the city of Glens Falls, and are remote from Hadley and Luzerne.

The Adirondack branch of the Delaware and Hudson runs northerly from Saratoga Springs through Hadley to North Creek, but the service on this line is very infrequent, there being only one train each way a day, except in the summer season. This train runs northerly in the morning and southerly in the afternoon, so that any person on the line of this road desiring to transact business in any of the municipalities to the south, and who are dependent upon this transportation, must spend parts of three days in the effort.

The hamlets situated to the east of Hadley in the valley of the Sacandaga river, in the towns of Day and Edinburgh, are also at a similar disadvantage. Their natural outlets are through Luzerne and Hadley, and they are dependent upon

the same transportation facilities. The population of the towns of Luzerne, Hadley, Day, and Edinburgh, by the census of 1915, was 2885.

Their natural trend of business with the outside world is toward the south, to and through Saratoga Springs. To serve this transportation the only common carrier is The Delaware and Hudson Company, and the service available is only what it gives on its Adirondack branch.

No connection is made between the bus lines of Scott and Ogden, and even if made the connection would not produce a satisfactory service or afford sufficient facilities to accommodate the probable demand.

In addition to the population of these towns affected, there is a large summer population in and about Luzerne and Hadley, amounting to several hundred, who have connections and interests toward the south, particularly with Saratoga Springs during the racing season.

It is quite apparent, therefore, that public convenience and necessity require the operation of this auto bus line as far north as Luzerne. Whatever travel there is beyond that to Lake George is adequately taken care of by the Ogden line, and the receipts of that line are sufficiently small to indicate that any substantial competition depleting its revenues will destroy its ability to operate. This situation was conceded at the hearing by the petitioner, who stated that he would be satisfied with a certificate limiting his operation from Saratoga Springs to Luzerne.

The question remains whether the operation between these municipalities, competing with the Scott line between Saratoga Springs and Corinth, would be such as seriously to affect the latter, and therefore against the policy of this Commission in permitting ruinous competition in these enterprises.

Corinth has a population, according to the last census, of 2661 inhabitants. It is at the present time still growing, many new enterprises being under way.

Both the Scott bus line and the bus line of this petitioner were actually placed in operation this year, although neither of them had a proper certificate from this Commission, so that actual experience of their operations could be and was put in evidence at the hearing. It was shown that notwithstanding the operation of the Latham bus line, there is no indication that the revenues of the Scott line are materially, if at all, depleted, and in fact its buses even with this competition are running on many of its trips to their full capacity.

The conclusion is, therefore, that the competition between Saratoga Springs and Corinth will not be sufficiently injurious to the existing line to authorize the denial of this petition, thereby prohibiting the operation of this line so sorely needed by the population of a very substantial area farther to the north.

A certificate therefore should issue permitting the operation to the petitioner between Saratoga Springs and Luzerne.

All concur.

In the Matter of the Petition of ORANGE COUNTY TRACTION COMPANY, filed February 12, 1920, under section 184, Railroad Law, for approval of a declaration of abandonment of a portion of its constructed route in the city of Newburgh. [Case No. 7355.]

Decided May 13, 1920.

Appearances:

Ainsworth, Carlisle, Sullivan & Archibald (by Mr. Charles B. Sullivan), Albany, attorneys for the petitioner.

John B. Corwin, Corporation Counsel, for the City of Newburgh.

Dr. John Deyo, Newburgh, and *James Magourty*, Newburgh, in person.

Bryant B. Odell, Secretary of Orange County Traction Company, Newburgh.

VAN NAMEE, Commissioner:

This is a petition by Orange County Traction Company, under section 184 of the Railroad Law, asking the approval of this Commission of a declaration of abandonment of a part of its line in the city of Newburgh described in the petition as "that part of its street railway route in the city of Newburgh, N. Y., located upon Bridge street, from the corner of Williams, Renwick, and Bridge streets to the end of the line in said city".

This matter has been before the Commission, though not in this exact form, in case No. 6921 which was decided on January 6, 1920. In that case this company petitioned for approval of a declaration of abandonment of the whole of its line on Bridge street. This line begins at the intersection of Renwick and Liberty streets and extends through Renwick and Bridge streets to the terminus of the line near Quassaic bridge, a distance of 2900 feet.

The Commission, in an opinion written by Commissioner Fennell, refused this petition, but suggested that the com-

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pany submit a declaration of abandonment of a portion of the Bridge Street line between the corner of Renwick, Williams, and Bridge streets and Quassaic bridge, a distance of 1475 feet. This present petition is the result.

In this present case a hearing was had before Commissioner Fennell in the city of Albany on March 11, 1920, at which evidence was taken, and the testimony and records taken in the former proceeding were received in evidence and made a part of the record in this case. A reading of such records and proceedings and of the minutes of the hearing, together with a study of the reports of the corporation on file with the Commission, show that this street railway system as a whole has not produced a fair return upon investment, nor has the line in question since its construction been a paying one.

The portion of the Bridge Street line proposed to be abandoned runs through a sparsely settled section, and the use of the line over a period of years indicates that it does not serve the public convenience to a very large extent. Commissioner Fennell in his opinion said:

It has been suggested that the territory lying in the right angle between Renwick street which runs westerly from Liberty, and Liberty street which runs southerly from Renwick, would be better served by a loop connecting the dead end at the end of Liberty Street line and what would be a dead end on the Renwick Street line if the Bridge Street end of that line were abandoned. Such a loop would probably require the abandonment of the Renwick Street line beyond Monument street, and the construction of a new line southerly on Monument street four blocks to Henry street, thence easterly on Henry street to Liberty street. There would be sufficient track in the abandoned line to build the loop. Such a loop would probably serve a greater public convenience than either the present layout or the two dead ends if part of the Bridge Street line is abandoned.

The City of Newburgh now intends to pave the portion of Bridge street in question, and if the company is not allowed to abandon this portion of the line it will soon be compelled to pay a large sum for its share of this paving.

The city, as represented by its corporation counsel at the hearing before Commissioner Fennell, stated that the city would not object to the removing of the tracks on Bridge street if within a reasonable time the construction of the proposed loop was begun. The Common Council has passed a resolution placing the time limit as of May 1, 1921. The company, through its representative, agreed to begin such construction on or before May 1, 1921, and it would seem in view of all the circumstances that this would be a reasonable solution of the problem.

On the condition, therefore, that on or before May 1, 1921, the company begin the construction of the so called Washington Heights loop, roughly described as follows, "from a point in the Renwick Street line at the junction of Monument street, through Monument street to Henry street, and thence easterly on Henry street to Liberty street to a connection with the present Liberty Street line," and that the said new construction shall be of the same grade and corresponding with the present standards of construction as the Orange County Traction Company line in the city of Newburgh, an order has been drawn granting the petition and allowing the company to take up its rails and remove its iron poles, wires, and all other appurtenances on the portion of Bridge street described in the petition.

All concur.

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Petition of the WOODLAWN IMPROVEMENT ASSOCIATION TRANSPORTATION CORPORATION under chapter 667, laws of 1915, for a certificate of public convenience and necessity for the operation of a stage route by auto buses on an additional route in the city of Albany. [Case No. 7401.]

Where a proposed auto bus line will serve a substantial population in a city much better than an existing trolley line, but will along a portion of its route compete as to territory now adequately served if permitted to carry local passengers, a certificate of convenience and necessity should be issued only upon conditions excluding the transportation of such local passengers.

Decided May 18, 1920.

Appearances:

W. W. Chambers, Albany, as attorney for petitioner.

Franklin B. Holmes, 85 Grove avenue, Albany, as Secretary and Treasurer of petitioner.

John J. McManus, Assistant Corporation Counsel, for the City of Albany.

William E. Woollard, Albany, as attorney for Pine Hills Association.

William H. Stoneman, 130 South Pine avenue, Albany, as Chairman of Transportation Committee of the Pine Hills Association.

Dean Harlan H. Horner, Albany, representing New York State College for Teachers.

John E. MacLean, Albany, as attorney for United Traction Company.

H. B. Weatherwax, as Vice-president, and *A. E. Reynolds*, as General Manager, United Traction Company.

KELLOGG, Commissioner:

This is an application for a certificate of convenience and necessity to extend the operation of an auto bus route in the city of Albany.

On March 16, 1916, an order was issued by this Commission, certifying to the convenience and necessity of the

operation by the petitioner of an auto bus route in the city of Albany, running over certain streets from the Union Station in Albany to the junction of Madison and New Scotland avenues, and thence on New Scotland avenue to the city line.

That application was opposed by the local trolley company, the United Traction Company, upon the claim that by the operation of the auto bus route in question certain revenues would be diverted from its treasury. Notwithstanding this opposition, the certificate, after a hearing and full discussion of the matter, was granted.

Local passengers were permitted to be carried easterly of the junction of Madison and New Scotland avenues, against the protest of the company, upon an express finding that any competition in that territory "*would be merely incidental and so slight as not to affect appreciably the revenues of the traction company*".

The order further recited —

"As to travel to points on or near New Scotland avenue itself, if such travel is diverted from the traction company it is because the lines of the traction company are too distant to afford proper means of transportation, and the traction company should not be protected as to this travel at the expense of the needs and convenience of the people in the New Scotland avenue neighborhood."

Subsequently, under date of May 14, 1918, the petitioner was issued a certificate permitting the operation of an auto bus line on Delaware avenue on a route to Slingerlands, which certificate contained the express restriction that no local passengers were to be carried between points within the city.

The present application is for an extension of the route of the petitioner from New Scotland avenue northerly on Allen street to Washington avenue, thence easterly on Washington avenue to Eagle street, thence to State street, and thence to Pearl street. This operation, if permitted, will provide a route of transportation in connection with that already established in the nature of a belt line operation.

The lines operated by the United Traction Company which come into consideration in this connection, are its Country Club and Pine Hills lines, which operate up State, across Lark, and up Madison avenue; its West Albany line, which operates up Washington avenue to Lark street, and thence up Central avenue to the city line; and its Belt line, a portion of whose route is on Madison avenue and Quail street.

It is claimed on behalf of the petitioner that there is a very substantial and a growing population residing in the area between Central and Madison avenues, which is not now adequately served by the United Traction Company. At Quail street, where lines on those two avenues are connected by the Belt line, the distance is about three thousand feet, which gradually increases toward the west until at Allen street the distance is three thousand six hundred and sixty feet, becoming steadily greater at the various intersecting cross streets to the west. Persons living in the center of this area are therefore at Allen street, where the proposed line will operate, about eighteen hundred feet, or something over a third of a mile, from the trolley service.

Between Washington and Central avenues, and westerly of Lark street, are located the Albany High School and the State College for Teachers. Much of the demand for this new route comes from those interested in these institutions, and who desire adequate and proper conveyance to them. There are also various public institutions on New Scotland avenue which by the extension here asked for would be connected with this area between Central and Madison avenues.

It would seem, therefore, in view of the conditions described, and the substantial local population which is not now conveniently served by the local trolley system, that the proposed auto bus line, as to this area and as to this service, would meet a public need and would serve a public convenience.

It should be borne in mind, however, in this connection,

that in June, 1916, shortly after the issuances of the first certificate to this petitioner, an application for an auto bus line made by Chauncey L. Butler and George W. Gallien, jr. [case No. 5547], was denied by this Commission. This route proposed to operate along the line of the route now in question easterly to Allen street, thence, instead of diverging to the south as does the route in question, it diverged to the north and ultimately reached a point in the town of Colonie near the West Albany District School. This was a separate route, having no connection with the New Scotland avenue enterprise, and it was found by this Commission that the issuance of a certificate was not warranted by the conditions.

A somewhat different situation now presents itself in view of the fact that this is an extension of an already existing route, which will further serve all the people thereon, and give them more ready access to certain comparatively inaccessible sections, and also in view of the situation developed on this hearing in regard to the necessity of providing connection between the College for Teachers, its professors, instructors, and resident scholars, which was not developed at the time of the hearing on the Butler application.

If the operations of the proposed line were limited to this area, which seems now not to receive adequate service from common carriers, it might safely be said that a certificate of convenience and necessity may properly issue.

There is, however, a serious objection to the granting of this application in its present form. This company proposes to follow the line of the United Traction Company as far westerly as the point where Central avenue and Washington avenue diverge, between Lark street and the Northern Boulevard. On all of the proposed route easterly of this point it will run along the line of the United Traction Company.

Along this line are many public buildings and theaters

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between which and the station, and intermediate points, there is much travel. It would be unjust and improper to permit the diversion of this travel from the United Traction Company, which apparently serves it reasonably well. It would result in a depletion of its receipts, perhaps to an extent necessitating a further increase of fare, thereby adding to the burdens of the traveling public generally in the city of Albany. To permit this, therefore, would be manifestly unjust and improper. Such travel would not be inconsequential, as was found to be the case at the time of the making of the original application of this petitioner, as to that portion of the public served by that line. The condition is the same as exists on the Delaware Avenue line, where the carrying of local passengers under a certificate given to this very company by this Commission, is prohibited.

At all points on this proposed route until it reaches some distance beyond Quail street, the facilities of the United Traction Company are sufficiently accessible to prospective passengers to prohibit as a matter of fairness to all passengers in Albany the installation of a competing line which, resulting in a decrease in revenues, also might result in an increase in fares.

There would also be some competition where the proposed line crosses Madison avenue at Allen street, but this would seem to be slight, and not worthy of serious consideration.

The direct competition toward the easterly end of the proposed route may be vital. If this certificate were granted, buses sufficient to accommodate all this local travel might be placed in operation and very serious damage to the existing trolley line would result.

This question, as all similar questions, must be solved for the greatest good to the greatest number, and in order to accommodate that smaller portion of the population, who will be better served by the proposed line, the whole trolley system of Albany should not be brought into danger, and the liability of imposing greater fares on the larger portion of the population be increased. Public necessity and

convenience would in nowise be served by such an operation, and a certificate permitting such result can not properly be granted.

If the petitioner sees fit within a reasonable time to procure an amendment to the consent granted by the city and modify its application so as to contain a provision that no local passengers shall be carried between points easterly of Ontario street (one block next westerly of Quail street), the certificate should be granted.

A similar restriction is contained, as has already been noted, in its Delaware Avenue franchise.

The operations of the Schenectady railroad are similarly limited in the city of Albany.

In numerous cases before this Commission similar restrictions have been inserted in certificates issued.

Unless in this case these conditions are imposed, it can not be said that public convenience or necessity requires the issuance of a certificate. The result would work to the detriment rather than the advantage of the traveling public as a whole.

Therefore, if the petitioner within thirty days from the date of this decision file an amended petition accordingly, having first obtained a corresponding amendment of the consent from the city, a certificate will issue without further hearing. In case of its failure so to do, the application should be denied and the case closed upon the records of this Commission.

Chairman Hill and Commissioners Barhite and Van Namee concur; Commissioner Irvine not present.

No. 502 : 287

In the Matter of the Complaint of the CHAMBER OF COMMERCE OF THE INCORPORATED VILLAGE OF TUPPER LAKE, Franklin county, *against* THE NEW YORK CENTRAL RAILROAD COMPANY (New York and Ottawa Railroad), asking for better passenger train service. [Case No. 7413.]

Decided May 20, 1920.

Appearances:

Hon. F. G. Paddock for Village of Tupper Lake and Chamber of Commerce.

Messrs. Allen & McClary for The New York Central Railroad Company.

BARHITE, Commissioner:

This is an application by the Chamber of Commerce of Tupper Lake village for an order requiring The New York Central Railroad Company to restore to service upon the New York and Ottawa division, trains Nos. 21 and 22, between Tupper Lake and Santa Clara. According to the present timetables, No. 21 leaves Ottawa at 8:25 a. m. and reaches Santa Clara at 12:10 p. m.; No. 22 leaves Santa Clara at 3:25 p. m. and arrives at Ottawa at 7:10 p. m. Tupper Lake is served by two trains upon the Ottawa division: No. 20 which leaves Tupper Lake at 5:45 a. m. and reaches Santa Clara at 7:22 a. m., and Ottawa at 11:15 a. m.; No. 23 leaves Ottawa at 4:25 p. m., Santa Clara at 8:12 p. m., and reaches Tupper Lake at 9:45 p. m. Santa Clara is 36 miles north of Tupper Lake. It is a very serious question whether the traffic upon the division would justify four trains upon the road, and it would seem that to substitute the two trains in the middle of the day for the morning and the evening trains would disarrange the through passenger service between Ottawa and points in New York state and the east reached by connection of the Ottawa division at Tupper Lake Junction with the Adirondack division, and would seriously delay the mail and the express service between the same points.

Without discussing in detail the above points, there is another consideration which should be decisive on this application. The blue line, so called, on the northern boundary of the Forest Preserve, is six or seven miles south of Santa Clara. For a distance of approximately thirty miles the trains between Tupper Lake and Santa Clara run through this Preserve. For the last ten years, under an order of this Commission, all locomotives passing through the Preserve from April 15th to November 1st, between the hours of 8 a. m. and 8. p. m., must use oil as fuel. Between 8. p. m. and 8 a. m., oil must be used unless the locomotives have been examined by the Commission and a certificate granted permitting the use of coal; and this certificate may be revoked at the pleasure of the Commission. The order to which reference has been made is very important, and is intended to protect our priceless Adirondack forests from destruction by fire. In this matter the Public Service Commission is working in harmony with the Conservation Commission. At present it seems to be impossible for the railroad companies to procure the necessary oil. Several hearings have been held, and as a result of the evidence produced the Commission has felt constrained so to modify its former order as to permit the railroads operating within the Adirondack region under such safeguards as can be devised by both Commissions, to use coal as fuel for a limited period of time during the Spring and Summer. Whether it will be necessary to still further suspend the operation of this order is a question for the future. Trains Nos. 20 and 23 do not pass through the Forest Preserve within the prohibited hours. Trains Nos. 21 and 22, if restored, would pass through the Preserve during the heat and the middle of the day, the most dangerous period so far as setting fires is concerned. The application, under present conditions, should be denied.

All concur.

No. 508:289

In the Matter of the Complaint of GRIFFIN LUMBER COMPANY of Hudson Falls, Washington county, *against* New YORK TELEPHONE COMPANY as to rate for second trunk line to central office from complainant's private branch exchange. [Case No. 7337.]

Additional trunk lines on a private branch telephone exchange should not be charged for at the same rate as the initial trunk line for the following reasons:

First: The benefit of the installation of additional trunk lines is not enjoyed exclusively by the subscriber, but is shared with the other telephone users in lessening congestion on the system. The general service is benefited by the more expeditious handling of the traffic not only as to the customer involved, but by avoiding "busy" reports on his lines, the time and attention of operatives may be given more expeditiously to the calls of others;

Second: The cost of installation is less; and

Third: The cost of rendering service is less.

Decided May 20, 1920.

Appearances:

Daniel S. Griffin, President, and *Harvey G. Neimer*, Secretary, of the Griffin Lumber Company, Hudson Falls, complainant.

Paul H. Burns, 15 Dey street, New York city, attorney for New York Telephone Company, respondent.

KELLOGG, Commissioner:

In this proceeding the tariff filed by the New York Telephone Company, effective December 1, 1919, applicable to the Hudson Falls exchange, is challenged as to the charge for additional trunk lines to private branch exchanges. For such additional lines the same rate is charged as for the initial line. Although this proceeding is local in its nature, the principle involved has a broad and probably state-wide application.

Prior to the tariff in question it had always been the rule

since the first development of the private branch exchange business to charge a smaller proportionate rate for additional trunk lines, usually three-fourths of and not the full rate charged for the initial line. This policy which had always prevailed up to the time of the effective date of the present tariff is now changed so as to charge the same for each additional line as for the first line, except in certain localities where consolidation with competing lines is under way, in which cases the former system of differentiation is adhered to, the reason therefor, as stated, being that in those localities it is proposed when the consolidation is completed generally to increase the rates and at that time this question will be treated with other proposed increases. In the meantime, the former policy of charging a lesser rate on added lines is continued in those cases.

A private branch exchange must, of course, have at least one trunk line. The connecting of additional lines does not necessarily increase the traffic, but expedites it and makes it more convenient and satisfactory. It does away with "busy" reports to a greater or less extent, and is an undoubted convenience. The traffic, however, could be handled after a fashion on a less number of trunk lines than are needed to insure service readily, expeditiously, and pleasantly. For this reason, since the initiation of the branch exchange business up to the time of the present tariff, there had been a differentiation in rates for additional trunk lines as compared to the initial one. The reason for this is very clearly stated by the witness for the telephone company in the following language:

"Originally it was deemed necessary to charge a lower rate for an additional trunk than for an initial trunk, in order to induce subscribers to private branch exchange service to contract for a sufficient number of trunks to adequately take care of the telephone business, both incoming and outgoing. This is quite an important feature. If a subscriber to private branch exchange service does not take enough trunks, the business that comes to him from the general public who has occasion to get into telephone communication with him is very apt to pile up. *That is, you get a congestion on the trunk line facilities, and you get*

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'busys,' and that reacts against the public. It also reacts against the subscriber, as a good many times when people get continual 'busy' reports they stop calling, and there is the lost call factor in that. If, on the other hand, the subscriber has a sufficient number of trunks, the public calling that particular subscriber gets through on a no delay basis. It makes the service to the other subscribers, their telephone service, more satisfactory to them because there is always a feeling, I think, of satisfaction when they have their calls completed with little delay. It reacts to the benefit of the subscriber because his customers get in touch with him without delay, and are not feeling peevish when they do get hold of him, and it reacts to the benefit of the telephone company in that satisfactory service is provided to the public, and satisfactory service means a satisfied public."

The italics are used in the foregoing quotation to develop the point that the installation of added trunk lines is not entirely for the benefit of the subscriber but for the benefit of the public in general, and for the good of the service.

It is also stated that the lower proportionate charge was also originally adopted as an advertisement, and in order to induce people to put in private branch exchanges. It is urged that the public has now been educated to the benefits of the private branch exchange, and therefore the proposed increased cost of the trunk lines can be insisted on without loss of business.

Whether this be the fact or not, it remains undisputed that the installation of the additional trunks, although not increasing the volume of service of a customer served on a flat rate, adds somewhat to the convenience of the system to him, but beyond that results in a benefit to the public at large and to the telephone company in handling the business. The benefit of the additional lines should therefore be in some measure borne by others than the customer himself who does not enjoy exclusively the added benefit resulting from their installation.

A second reason why the additional lines should be charged for at a less rate than the initial line is that the proportionate cost of installation is somewhat less. To put in one trunk costs more than half of the cost of putting in two trunks. When the two trunks are installed together, the

labor cost is not materially greater than when one is installed alone. The same is proportionately true of any added number installed at the same time.

If the additional lines are put in after the first line, the line of connection is already laid out. It does not have to be planned or developed, it merely has to be followed.

A third reason why there should be a differentiation in these charges is due to the fact that the time of the operator required to serve the additional lines is less in proportion. Exhibits were introduced to indicate that in New York, in the larger private branch exchanges, there was greater service per trunk than on the smaller ones.

However this may be in the city of New York, and whatever the conditions may be where message rates are charged, this contention does not apply to flat rate service in the smaller municipalities. Here an outgoing or incoming message has to be handled in any event, whether there is one or additional trunk lines, and the additional trunk lines are merely used for the overflow. The service is not substantially increased where the additional trunk line is put in. It is merely handled more expeditiously. It is even probable that less time of the operator is consumed where there are multiple trunk lines, than where there is only one of such lines of connection. Many of the "busy" reports, necessitating further attempts to make the connections, are avoided. Thus the actual time of the operator consumed in connecting the calls is lessened where adequate lines of communication are in place.

Therefore the proportionate rate of charges for initial and additional trunk lines effective prior to the present tariff should be restored, and the added trunk lines should be charged for only at the rate of three-quarters of the charge for the first one. The reason for such order may be summarized briefly as follows:

First: The installation of additional trunk lines does not materially increase the volume of traffic, and a flat rate

customer is benefited thereby only by the more expeditious handling of his business. The benefit is not enjoyed exclusively by him, but it is shared with the other telephone users in lessening congestion on the system. The telephone service in general is benefited by the more expeditious handling of the traffic, not only as to the customer involved, but by avoiding "busy" reports on his lines, the time and attention of operatives may be given more expeditiously to the calls of others.

Second: The cost of installation is less.

Third: The cost of rendering service is less.

It is therefore recommended that an appropriate order be made restoring former conditions in this regard.

All concur.

Investigation by this Commission of Ten Cents Fare Charged Passengers on the Railroad of THE BLACK RIVER TRACTION COMPANY between Watertown and Glen Park. [Case No. 7321.]

Complaint of INCORPORATED VILLAGE OF BROWNVILLE, Jefferson county, by Fred L. Page, Village President, *against* THE BLACK RIVER TRACTION COMPANY as to increase in passenger fare. [Case No. 7325.]

Respondent's rate of fare between Watertown and Brownville of ten cents, without return tickets at a reduced rate, sustained.

A similar charge between Watertown and Glen Park modified by requiring the issue of round trip tickets at fifteen cents.

Decided May 25, 1920.

Appearances:

E. R. Wilcox, Watertown, attorney for the Village of Glen Park.

Breen & Breen (by Isaac M. Breen), Watertown, for the complainant, Village of Brownville.

Delos M. Cosgrove, Watertown, attorney for The Black River Traction Company, and *L. Schwerzmann*, General Manager of The Black River Traction Company, Watertown.

KELLOGG, Commissioner:

These two proceedings, the nature of which is sufficiently indicated by the titles, involve the propriety of certain increases in fare put in force by tariffs filed by the respondent, effective September 15, 1919, and February 5, 1920.

Many of the material facts being pertinent to both cases, repetition may be avoided by considering them together.

The Black River Traction Company operates a street surface railroad in Jefferson county with headquarters at Watertown. In addition to two local lines in that city, it operates a suburban line through the villages of Glen Park and Brownville to the village of Dexter.

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This suburban line starts at the public square in the city of Watertown, and passengers using the two local lines above referred to, of one mile and one mile and a quarter in length respectively, are entitled to free transportation over the first zone of the suburban line.

This line proceeds along Court and Main streets to the corporate limits of the city, a mile and three-quarters, thence skirting the right bank of the Black river, it proceeds through the following municipalities for the following approximate distances: town of Pamela, 1 mile; village of Glen Park, 2 miles; village of Brownville, 1 mile; town of Brownville, 3 miles, to the village of Dexter.

In the town of Brownville is a stop known as Kirby Point, distant $1\frac{3}{4}$ miles from the village of Brownville and $1\frac{1}{4}$ miles from the village of Dexter.

The operations of this road have been conducted on a five cents fare basis, with ticket privileges hereinafter mentioned, the suburban traffic being divided into zones, for each of which the five cents fare was collected or ticket accepted.

Prior to the present increases, now in controversy, the four zones into which the traffic to Dexter was divided consisted of—

1. From Watertown to and including a stop known as Pole 9 in the village of Glen Park, a distance of 3 miles, with transfer privileges extending $1\frac{1}{4}$ miles farther.

2. From Pole 9 to the westerly boundary of the village of Brownville, a distance of $2\frac{3}{4}$ miles.

3. From the westerly boundary of the village of Brownville to the Kirby Point stop, a distance of $1\frac{3}{4}$ miles.

4. From the Kirby Point stop to the village of Dexter, a distance of $1\frac{1}{4}$ miles.

Prior to March 7, 1919, books containing 25 tickets were sold for a dollar, by which the fare was reduced to four cents; and prior to September 15, 1919, 4 tickets were sold for fifteen cents, making the fare for such ticket holders three and three-quarters cents. Although these latter tickets were

stated by the tariff to be good for any four five cent fares, it was the custom to use them only for return trips between Watertown and Brownville, or for a one way trip between Dexter and Watertown.

In an attempt to solve the problem of rising costs during 1919, certain changes were made. On March 7, 1919, the twenty-five ticket books were withdrawn, and on September 15, 1919, the fifteen cent tickets were withdrawn, reducing the entire transportation system to a flat fare.

By the tariff effective February 5, 1920, the zones were changed so that the first zone, instead of extending to the point in the village of Glen Park, terminated at the westerly boundary of Watertown bringing the entire village of Glen Park within another zone, thereby doubling the fare to Watertown within the area between the former and the present westerly limits of the zone.

The investigation in the Glen Park case brings up for consideration the propriety of this change of zone limits. The complaint in the Brownville case is directed against the withdrawal of the round trip tickets, which increased the cost of a round trip between Brownville and Watertown from fifteen to twenty cents.

Representatives of both villages, in opposition to the fare increase, relied upon the limiting provision in the franchise granted by the trustees of the Village of Brownville to the Watertown and Brownville Street Railway Company, the predecessor in title and interest of The Black River Traction Company.

This franchise was granted October 28, 1890, and under it the road was constructed from Watertown to Brownville.

This franchise provided that no greater fare than ten cents should be charged for any one continuous ride in the village of Brownville to any point in the city of Watertown, and further provided that the company should issue return tickets between points within the two municipalities for the sum of fifteen cents. It is claimed that the cessation of the

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issue of these round trip tickets is unlawful because it is a violation of this franchise restriction.

It was held by the Supreme Court at special term, in the *Matter of Koehn against Public Service Commission*, 107 Misc. 151, that a fare restriction imposed by a local municipality is not binding outside its boundaries, and that it has no authority to prescribe rates of fare in other municipalities.

Counsel seek to distinguish that decision from these cases upon the ground that there the road affected was a so called "high speed" line, which but for little of its course traversed public streets, being principally constructed upon a private right of way.

However, the line did in the municipalities there affected cross public streets, and for a short distance occupy them, rendering the consent of the municipalities necessary. This consent was as necessary there as in the case of the respondent here. Any limitation imposed as a condition to granting the consent would be equally binding in both cases.

The opinion in the *Koehn* case being the latest utterance of our Supreme Court on the subject has been followed by this Commission in various instances. [*Matter of Schenectady Railway Company*, case No. 6853, decided May 20, 1919; *Complaint of Village of Goshen against Wallkill Transit Company*, decided November 6, 1919; *Complaint of Harry A. Wilkinson as President of the Village of Clinton, Oneida county, against New York State Railways*, decided November 25, 1919; *Complaint of Wilkins against New York State Railways*, decided November 25, 1919; *Matter of United Traction Company*, decided January 22, 1920.]

Therefore, following the decision of the Supreme Court and various previous decisions of this Commission, it must be held here that the action of the Village of Brownville in attempting to limit the fares for transportation of passengers beyond its boundaries does not deprive this Commission of jurisdiction to regulate such fares.

The remaining question to be determined is whether the increases proposed are just and reasonable.

It will be noted at the outset that this controversy is in its nature somewhat different than the ordinary rate case with which we have had to deal of late. There is no general increase in fares. The increases here affect only a certain class of passengers, namely those to be transported between Watertown and the villages of Glen Park and Brownville.

Although the general financial condition of the company is important as bearing upon the question as to whether it is entitled to any increase whatsoever, the principal question here involved is whether the increases sought, affecting certain of its patrons only, are fair, and whether when they are called upon to bear the entire burden of the increases they are being required to do more than their proportionate share to meet the increased obligations of the company due to high and rising prices.

In the year 1916 this company earned from its railroad operations a gross income applicable to interest charges and dividends of \$43,904.90. In 1917, owing to non-operations due to labor troubles, the company showed a loss from railroad operations of \$2978.37; in the year 1918 the income from railroad operations was \$21,053.84; in the year 1919 the income from railroad operations was \$25,245.01.

Some portion of the latter figure reflects the collection of the increased fare due to withdrawal of the reduced rate tickets.

In 1917 this Commission on an application by this company to increase its capital stock caused an examination to be made of its affairs, which resulted in a report, approved by this Commission, that the reproduction cost of the items constituting its fixed capital was \$633,986.69; the depreciation of such items amounted to \$81,857.39, leaving a then actual value of \$552,129.30.

Evidence was given on the hearing showing the correctness of this valuation which stands undisputed in the case.

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The books of the company were corrected accordingly, and ensuing additions and deductions from the fixed capital up to and including December 31, 1919, the present table shows approximately an amount on which this respondent is entitled to fair return, as follows:

Fixed capital	\$680,730.58
Construction work in progress.....	1,033.33
	<hr/>
	\$681,783.91
Less depreciation	88,282.85
	<hr/>
	\$593,501.06
Allowance for working capital, equal to materials, supplies, and cash on hand.....	84,107.88
	<hr/>
	\$627,608.44

The income return on this investment for the past two years has been somewhat less than 4 per cent. The average return for the past four years was at about the same rate.

Evidence was given of the largely increased cost of all kinds of supplies used in railway operation, together with a substantial addition in wages paid for labor.

From the foregoing it is quite evident that the proposed increase in fare, affecting as it does only a portion of the line, can not result in any such increase of return on the capital invested as properly to be considered excessive.

The remaining question heretofore suggested, however, remains for consideration. Has it been shown that these increases, local in their application and imposing the burden of producing additional revenue on certain localities only, are fair, taking into consideration the charges of the company elsewhere? Is undue burden being imposed upon these localities by reason of the rates complained of?

As to the Village of Brownville a ten cents fare in each direction to Watertown is being charged, as always has been charged, and as provided for in the franchise for one way ride. The privilege of obtaining a return ticket for fifteen cents, however, has been withdrawn.

The distance between the center of the village of Brownville and the business center of the city of Watertown, at Public Square, which probably represents the length of the

average ride between these municipalities, is $5\frac{1}{4}$ miles. The full rate charged of ten cents can not be deemed to be excessive when we bear in mind this probable average ride, which might be increased to 7 miles, the length of the two zones traversable for the ten cents fare from any point in Watertown to the westerly bounds of the village of Brownville, is at the rate of less than two cents a mile.

The two zones farther to the west aggregate only 3 miles in length, which shows whatever distinction there is as to mileage rate charged for length of haul is entirely in favor of the Brownville patrons rather than against them. It would seem, therefore, that the charge of ten cents straight fare between Brownville and Watertown without reduction for return trips, is within reason and entirely proper.

As to the village of Glen Park, however, a different question arises. It lies intermediate Watertown and Brownville. A major portion of the travel between Watertown and Glen Park was within the limits of the former first zone, for which the charge was five cents. Several hundred employees use these routes daily, living in Watertown and working in the mills in Glen Park. In addition, there is the patronage of the villages between their homes and business places in the city.

The question of this rate of fare was a matter of adjudication by this Commission in the early days of its existence. By its decision made January 12, 1908, reported *I Public Service Commission, Second District Reports*, 240, an increase of fare from five to ten cents was held to be unreasonable and unjust and was discontinued.

The previously existing zone including much of the village of Glen Park was $4\frac{1}{4}$ miles in length, taking into account the traversable points over the other lines of the route in the city of Watertown. This, of course, is out of proportion to the other zones described, and the shortening of its length with a corresponding increase of the zone next to the west is entirely proper in order to avoid undue discrimination

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between various patrons of the company. On the other hand it would seem to be unfair to charge the Glen Park patrons for transportation to Watertown the same rates throughout as are charged to Brownville patrons whose average transportation is probably two miles longer. This inequality may be equalized by charging the former fifteen cents for the round trip.

The situation can be fairly met by directing the sale of return trip tickets covering transportation between all points in the village of Glen Park and the city of Watertown at fifteen cents. This disposition of the matter will fairly equalize the charges as between the residents of these respective villages as to each other and as to the other patrons of the line.

Chairman Hill and Commissioners Irvine and Van Namee concur; Commissioner Barhite not present.

In the Matter of the Joint Petition of GREAT SOUTH BAY FERRY COMPANY and JULIUS BINDRIM as to the railroad formerly owned by the Freeport Railroad Company. [Case No. 7503.]

Railroads can be lawfully operated only by Railroad Companies.

A "Ferry Company" organized under the Transportation Corporations Law can not lawfully operate a street railroad.

Decided May 25, 1920.

KELLOGG, Commissioner:

On the receipt and reference of this application question arose as to the power of the petitioner, organized under the Transportation Corporations Law as a "Ferry Company," to acquire and operate a street railway.

The petitioner being incorporated for that purpose operates a ferry between Freeport and other points in the town of Hempstead, in Nassau county. In connection with this ferry it operated for several years a street railway from Front street to its ferry dock, a distance of 1.25 miles.

Connecting with this railway is the trolley line formerly owned by the Freeport Railroad Company, which was sold under foreclosure and purchased by one Julius Bindrim, president and treasurer of the petitioner, and later transferred to this petitioner. This addition makes the total length of railroad operated by the petitioner 2.67 miles.

The petitioner asks the approval by the Commission of the operation of the railroad by it, and also the approval of the transfer of the rights and franchises of the Freeport Railroad Company.

A hearing was designated in order to give the petitioner an opportunity to present any arguments it might wish as to its right to operate the railroad in question. Its attorneys, however, advised the Commission that they would be unable to attend for several weeks, and suggested that the matter be disposed of without such hearing.

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The petitioner is organized as a ferry company under article 2 of the Transportation Corporations Law. By section 4 contained in that article the powers of a ferry company are limited to the right to establish and maintain ferries. There is no authority in law for the operation of a railroad by a ferry company. Such operation is clearly *ultra vires*. Railroads can be operated within this State only by a railroad company. [*People ex rel. Westchester St. R. R. Co. v. P. S. Com.* 158 A. D. 251; *New York Terminal Co. v. Gaus*, 139 A. D. 347; *Trojan Railway Co. v. City of Troy*, 125 A. D. 362.]

A corporation can not exercise powers conferred upon corporations formed under laws other than that under which it itself incorporated, when such powers are not included among or incidental to those conferred by the law under which it is organized. [*Public Service Commission v. Rogers Co.* 184 A. D. 705; *People ex rel. Cayuga P. Corp. v. P. S. Comm.* 226 N. Y. 527.]

The contention that the operation of the railroad, which is over two and one-half miles in length, traverses the populous village of Freeport, and on which fares are collected from passengers not using the ferry, is merely incidental to the ferry operations, is without force. The railroad is a connecting line with the ferry, and not merely a part of it.

The consent of this Commission, therefore, can not be given to the operation of this railroad by a company having no authority under the law to operate it, and the petition must therefore be denied. The formation of a railroad company under the provisions of law would seem to be a simple matter, and one which would meet the situation.

Chairman Hill and Commissioners Irvine and Van Namee concur; Commissioner Barhite not present.

Petition of GEORGE W. GRAVES of Glens Falls under chapter 667 of the laws of 1915 for a certificate of public convenience and necessity for the operation of a stage route for passengers and freight by auto buses in the city of Glens Falls, it being proposed that the route shall also be operated between Glens Falls and the hamlet of Schroon Lake, Essex county. [Case No. 7562.]

Automobile lines carrying freight only do not require the consent of the local authorities or the certificate of this Commission under sections 25 and 26 of Transportation Corporations Law.

A certificate of convenience and necessity will not be issued to a proposed through auto bus passenger line, where transportation between the termini of the proposed line may be had over the local lines of existing carriers, by transfers between such local lines.

Decided June 15, 1920.

Appearances:

Hugh S. Lavery for the applicant.

James McPhillips and *C. E. Fitzgerald* for the Hudson Valley Railway Company, The Delaware and Hudson Company, the Chestertown-Warrensburg Stage Company, the Warrensburg-North Creek Stage Company, the Riverside and Schroon Lake Stage Company, and the Warrensburg-Glens Falls Express; *Chambers & Finn* (by Mr. Finn) for the Glens Falls-Bolton Stage Line, Inc.

KELLOGG, Commissioner:

Upon the hearing in this matter it developed that the petitioner desires to put in operation both passenger and freight auto bus lines between the city of Glens Falls and the unincorporated village of Schroon Lake, a distance of about forty-eight miles. He proposes to operate these enterprises separately, the freight to be carried in vehicles distinct from the buses carrying passengers.

It has been uniformly held by this Commission that no

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certificate of convenience and necessity from this Commission is required for the operation of a line carrying freight exclusively. This interpretation of the law is based upon the wording of sections 25 and 26 of the Transportation Corporations Law, in connection with the decision of the Supreme Court in *Public Service Commission v. Hurtgan*, 91 Misc. 432, which seems to limit the application of the sections to passenger carrying lines.

Evidence was given by substantial merchants of Glens Falls and Schroon Lake to the effect that the present transportation of packages and parcels was inadequate, and that public convenience would be progressed and public necessity served by granting an extension of permission to the applicant to carry freight. On the other hand, it was contended by the established lines that the present service was adequate, which contention was also supported by certain patrons from Chestertown and Schroon Lake.

This mooted question, however, need not be considered and decided here because the applicant, if he sees fit, may establish and operate without our certificate his freight carrying line, as under his plan it is in nowise connected with his proposal to carry passengers by other vehicles.

This leaves for determination a question only as to whether the passenger traffic on the proposed route is at present adequately served.

The entire route is covered at present by various carriers, and transportation may be had between the termini of the proposed route if sufficient changes are made.

Commencing at Glens Falls and running northerly to Lake George, a distance of 9 miles, The Delaware and Hudson Company operates a steam railroad transporting passengers. Between these points the Hudson Valley Railway Company maintains a trolley line operating a two hour schedule throughout the year, which schedule is largely increased in the summer season. The Glens Falls-Bolton Stage Line also operates between these points. The Hudson Valley Rail-

way Company rendering the service stated extends still farther northerly to Warrensburg, 6 miles beyond Lake George.

Chestertown is an unincorporated village about twelve miles northerly of Warrensburg. There is a stage line between it and Glens Falls, but the evidence indicates that its operations are largely, if not entirely, confined to freight carrying, and it does not, at least to any great extent, transport passengers.

There is, however, a passenger carrying stage route which connects with the Hudson Valley railway at Warrensburg, proceeding northerly to Chestertown, and thence westerly to Riverside and North Creek. There is another stage route which runs from Riverside to Schroon Lake. This line progressing easterly retraces the course of the Warrensburg-North Creek line about two miles to Loon Lake, whence it turns northerly and proceeds to Schroon Lake.

During the summer time the schedules are arranged so that passengers may make connections at Loon Lake between these stage lines going in either direction. On unusual occasions both these stage lines last mentioned are overcrowded. This occurs only a few days of each year, at which time additional accommodations are supplied by the owners.

During a few weeks of the Summer these buses run well loaded, but still usually somewhat short of capacity, and during the remainder of the year the travel is very light, only a small percentage of the capacity of the vehicles being occupied.

Although a transfer is necessary, the two bus lines in question give adequate facilities for transportation of passengers between Schroon Lake and Warrensburg, and southerly of that point the service of the Hudson Valley Railway Company, together with The Delaware and Hudson Company, and the Glens Falls-Bolton Stage Line, south of Glens Falls, adequately meet all demands.

Of course it would be more convenient for the few passengers who wish to make the through trip to make it with-

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out transferring, and the consequent delay which frequently and unavoidably occurs. Through traffic, however, would be very slight and entirely insufficient to maintain the line. It would, of course, if permitted to operate, derive much of its revenue from passengers carried between intermediate points and thus be in direct competition with some one or the other of the local utilities now in operation.

It has been lately held by the California Railroad Commission in *F. A. Wilson & Company* P. U. R. 1920C, 635, decided February 11, 1920, that a certificate to operate an auto stage service will not be granted for the purpose of affording through service between designated points where existing lines render adequate service between intermediate points.

This I think is consistent and entirely in line with the practice of this Commission to discourage competition where existing lines are rendering adequate service, and the position is not changed by the fact that the proposed line in question asks to render a through service where now the through trip may be made only by using a succession of established carriers.

In this, as in other cases, competition not demanded to serve a public necessity will tend toward the demoralization and perhaps destruction of the facilities now enjoyed, and thus in the end work to the disadvantage and not to the convenience of the public.

Inasmuch, therefore, as this petitioner would be entirely within his rights to carry packages and freight without our certificate, and there is no need of an added line for transportation of passengers, this application should be denied.

It has been thought proper to dispose of this matter on the merits. The certificate of this Commission could not in any event issue under present conditions as it appears that no consent has been given to the operation of this line by the Village of Lake George, although that municipality has brought itself within the provisions of section 26 of the

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Transportation Corporations Law, pursuant to chapter 307 of the laws of 1919. The foregoing disposition of the case renders application to the authorities of that village unnecessary.

Chairman Hill and Commissioners Irvine and Van Namee concur; Commissioner Barhite not present.

Petition of the NEW YORK, ONTARIO AND WESTERN RAILWAY COMPANY under section 54, Railroad Law, for consent to the discontinuance of its Franklin station in Delaware county, or making it a non-agency station. [Case No. 7540.]

Abandonment of railroad station:

When, on a petition to abandon a station or make the same a non-agency stop, it appears from the evidence that the station is not run at a loss, nor are any extensive economies to be effected by its discontinuance, and that no public convenience is served by such abandonment, the petition will be denied.

Decided June 15, 1920.

Appearances:

C. L. Andrus, 3714 Grand Central Terminal, New York city, as attorney, and *J. H. Nuelle*, Middletown, general manager, for the petitioner.

H. C. and B. D. Stratton, Oxford, (by *H. C. Stratton*) as attorneys for people around Franklin Depot.

A. King, Franklin Depot, Delaware county, in person.

VAN NAMEE, Commissioner:

The Franklin station of the New York, Ontario and Western railroad, which, by the petition in this matter it was proposed to abandon or to make a non-agency stop, is situated on the main line of such railroad between Walton and Sidney in the county of Delaware. About 1.7 miles southeast of Franklin station is situated the Merrickville station.

The Franklin station was established at the time the railroad was built, about fifty years ago, and the Merrickville station after being for some time abandoned was reestablished by the railroad about ten years ago.

The proposition in this case is to abandon the Franklin station, and remove the business to Merrickville station, if necessary making the Franklin station a non-agency station. Neither station is surrounded by a settlement or a village.

At the Franklin station there is a general store, a trestle for unloading coal, and a feed and coal business. At the Merrickville station there is a general store, one feed store, and open coal bins for the receipt of coal. The sidings and trackage at Franklin are the more extensive. Most of the business transacted at both of these stations comes from the village of Franklin, situated about 5.2 miles from either station in a northerly direction.

The evidence shows that the greater part of the railroad transportation business, both passenger and freight, of the village of Franklin, a hamlet of about five hundred population, and not directly reached by any railroad, is transacted at the Franklin station, very little of it going to Merrickville. While there was conflicting evidence, the majority consensus of opinion seems to be that the road from Franklin to both of these stations is practically the same as to condition and as to grade: both are country roads. The road from Franklin to the Franklin station in the Winter is apt to be more drifted and harder to break open than the Merrickville road for the reason that the road to Franklin station in some places is through a rocky cut where the snow drifts, while the Merrickville road is in the open fields, and those desiring to use the road can go through the fields around the deeper drifts.

The railroad in presenting its case gave no figures as to the amount of business at the Franklin station, nor at the Merrickville station to which the business of Franklin station is proposed to be removed. The only reason given why the Merrickville station is preferable, from the railroad's point of view, is that the grade approaching the Franklin station from the south is slightly heavier than at the Merrickville station. The evidence shows that there are three north-

bound passenger train stops and one flag stop and three southbound passenger train stops during the day at each station.

It was brought out by the evidence of those opposed to a removal of the station that the expense of maintaining the Franklin station is: one station master and a telegraph operator, the combined wages of both being about \$240, while at the Merrickville station there is but one station master whose salary is \$95 per month. The other expenses, such as heat, fuel, and light, are practically the same for each station.

The abandonment of the Franklin station or making it a non-agency stop would effect a saving to the railroad of not more than \$1000 yearly, to offset which an expense must be incurred by the railroad in the construction of coal trestles and additional sidings at Merrickville.

Evidence was presented to show that the receipts of the Franklin station for passengers, freight, and express of all kinds during the year ended March 31, 1920, was \$47,991.99. Evidence was also presented that the owner of the general store at Franklin and the owner of the feed and coal business had established their business at this place because it was a station stop, and for that reason people came to that locality, and in that way it brought business to them.

The mail contract for the village of Franklin calls for the delivery of mail at Franklin station, and the mail is also delivered from this point to Trout Creek, a hamlet of approximately 100 people, about six miles away in a south-westerly direction, and to Treadwell, eight miles away in a northeasterly direction. These hamlets are not reached by a railroad, and if Franklin station is abolished their inhabitants will be compelled to travel about two miles farther to reach a station on this railroad.

The railroad presented a petition favoring its request in this matter, on which were 72 names, among them being approximately 15 of the business men of the village of Franklin. In opposition a petition was presented contain-

ing 280 names, among them being the names of 17 of the business men of the village of Franklin, and practically all of the business interests of the hamlets of Treadwell and Trout Creek, and all the farmers in the vicinity of Franklin station.

The manager of the Franklin Dairy Company which does the largest business with the railroad of any interest in the village of Franklin gave evidence that tended to show that he preferred the use of the Franklin station to the Merrickville station. As a matter of fact, both of these stations are open at the present time to the people in the vicinity who wish to use the railroad either for carrying passengers or receiving freight. The fact that most of the business has for a number of years been brought to the Franklin station tends to show that the people prefer that station to the Merrickville station.

The opinion of the majority in the neighborhood, as shown by the petition, seems to be in favor of retaining the Franklin station, and the income proves the station to be not an unprofitable one. The economies to be effected by the railroad if the proposed change is made are small, especially when the amount of business now done at this station is considered. No good reason seems to be presented for the change. The station is not run at a loss; no extensive economies are to be effected by its discontinuance; nor is there any public convenience served by its abandonment, or by making it a non-agency stop and diverting the business to Merrickville.

It is but fair to the railroad to say that the matter was evidently presented to the Commission by it at the request of the signers of the petition for the abolition of the station, and that upon the development of the opposition manifested at the hearing and the presentation of the petition filed against the moving of the station, far outnumbering that in favor of its abolition, the railroad did not press very heavily for a favorable consideration of its request.

In view of all these facts, and for the reasons above stated, the petition is denied. An order has been entered accordingly.

Chairman Hill and Commissioners Irvine and Kellogg concur; Commissioner Barhite not present.

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Petition of complaint of FULTON FUEL AND LIGHT COMPANY under sections 71 and 72, Public Service Commissions Law, asking that said company may be allowed to charge increased rates for gas in the city of Fulton and town of Granby, Oswego county. [Case No. 7508.]

Basic rate for gas in the city of Fulton and town of Granby, Oswego county, increased to \$2.50 per thousand cubic feet with discount of ten cents per thousand cubic feet for prompt payment.

A minimum charge and a service charge should not be allowed on the same schedule; in this instance the service charge is deemed to fit the conditions best, and one of 35 cents per meter is allowed.

Decided June 15, 1920.

Appearances:

Addison D. Merry, attorney, 706 Dillaye Building, Syracuse.

Carl Riddleberger, manager, Fulton, for the Fulton Fuel and Light Company.

VAN NAMEE, Commissioner:

On May 3, 1920, the Fulton Fuel and Light Company filed with the Commission a petition asking to be allowed to increase the schedule of charges for gas consumed by its customers. At the time of the petition the rates were as follows:

First 2000 cu.ft.	\$2.10 per M cu.ft.
Next 3000 cu.ft.	\$1.85 per M cu.ft.
Next 5000 cu.ft.	\$1.60 per M cu.ft.
All over 10,000 cu.ft.	\$1.10 per M cu.ft.

A discount of 1 cent per hundred cu.ft. was allowed for prompt payment.

In addition there was a service charge of 25 cents per meter per month and a minimum charge of \$1 per month for meter, except in certain instances.

The rates proposed to be charged by the new schedule were:

First 10,000 cu.ft.	\$2.40 per M cu.ft.
Next 10,000 cu.ft.	\$1.80 per M cu.ft.
All over 20,000 cu.ft.	\$1.25 per M cu.ft.

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with a penalty of 10 per cent on all bills if not paid by the 10th of the month following that in which the gas is used. The service charge of 25 cents and the minimum charge of \$1 now existing are continued.

Due notice of a hearing was published in the local papers, and written notice was sent to the Mayor and Corporation Counsel of the City of Fulton. A hearing was held in the city of Fulton on Saturday, May 22, 1920. Aside from the appearances for the company, noted above, no one appeared.

This case is really a continuation of case No. 6460, which was a complaint by Victor C. Lewis as Mayor of the City of Fulton against the company both as to rates and service. By an order entered the 23rd day of March, 1920, certain suggestions were made as to improvements in the service, but the company was allowed to continue the rates then in effect, an increase in which is asked by the company in this petition.

The following table shows the revenues and revenue deductions for the years 1917, 1918, and 1919, and the first three months of 1920. Part of the year 1918, and the whole of 1919, and the three months of 1920 are under the rates now in existence:

	1917	1918	1919	First three months, 1920
Revenues:				
Sales of gas.....	\$37,770.00	\$46,415.23	\$47,366.58	\$12,947.68
Sales of byproducts.....	9,783.45	8,967.09	7,379.43	2,890.97
Miscellaneous.....	601.65	432.92	1,766.19	.....
Totals.....	\$48,155.10	\$55,815.23	\$56,512.20	\$15,838.65
Revenue deductions:				
Operating expenses.....	\$35,539.01	\$45,968.11	\$48,407.65	\$17,110.22
Taxes.....	2,891.02	2,637.36	3,030.90	825.00
Uncollectible bills.....	158.95	180.00	240.00	78.00
Total revenue deductions.....	\$38,578.98	\$48,785.47	\$51,678.55	\$18,010.22
Available for interest, dividends, and surplus.....	\$9,576.12	\$7,029.76	\$4,833.65	\$8,171.57

Deficit for January, February, and March, 1920, \$2171.57, or a probable deficit for the year 1920 of \$8656.28.

If the rates remain at the present figure, and expenses do not increase, the company is faced with a substantial deficit at the end of the present year. Whatever increase in revenue is seen in the last two years is almost entirely due to the increase in rates. Operating expenses have steadily increased. The great increase in expenses of 1918 over 1917 was due to causes affecting in like manner all other companies manufacturing artificial gas. The chief items of increase were in coal and in labor. There are small increases in a number of items, the only notable amounts being due to the efforts of commercial development which appear to be yielding results. The consumption seems to have increased about 10 per cent so far in 1920 over the corresponding period in 1919.

The items of general amortization in 1918 were \$543.23; in 1919 they become \$2537.26. This was due to change in the plan. Formerly the charge was made at 2 cents per thousand cubic feet of gas accounted for. This was increased to 10 cents. This method of providing for depreciation is certainly open to criticism, but the total amount charged to this account can not be criticised. It is less than 2 per cent of the probable value of the plant.

The increase of labor costs for the first three months of 1920 over a corresponding period of 1919 is over 90 per cent which is partially accounted for by the extra severe Winter of 1920, and the item of \$775.50 for expense of soliciting new business which was undertaken by the company in an effort to increase its sales. As mentioned above, this expenditure seems to be justified by results. That the company is doing the amount of business to be expected is shown by the fact that the present consumption in Fulton is not greatly disproportionate to the consumption in other cities in this district of about the same size.

The generating plant of the petitioner has no side track facilities. Coal has to be handled by trucks a considerable distance, with resulting enhancement of cost of approxi-

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mately \$1 per ton. There are physical difficulties in the way of procuring proper side track facilities, but it is in evidence that the company has been making efforts to remedy the condition and expects soon to make an application to the Commission to increase its stock to cover necessary expenditures. This relief, however, is not in sight for this year, and this expense will therefore continue.

In general, the production costs of this company are not disproportionate to other companies of its size throughout the State.

The gas sales for 1919 amounted to 24,910,700 cu.ft. The first three months of 1920 show gas sales of 6,828,500 cu.ft., or at the yearly rate of 27,402,000 cu.ft.; about a 10 per cent increase over the sales of 1920, but not enough at the present rates materially to affect the total revenues.

The population of Fulton is approximately 14,000, and increases slowly so that the prospect of any large increase in the near future is not encouraging.

The company in its proposed schedule of rates includes both a service charge of 25 cents per month per meter and a minimum charge of \$1 per month per meter, the latter charge being absorbed if the monthly consumption charge equals or exceeds it. These two charges are intended for the same purpose, namely, to reimburse the company for costs incurred regardless of whether the consumer uses any gas or not. Therefore, both charges should not appear on the same schedule, and one should be eliminated. In the present case, the revenue derived solely from this minimum charge would be unquestionably very small as with gas at \$2.40 net per thousand cubic feet and a minimum charge of \$1 per month, it would only require a consumption of slightly more than four hundred cubic feet per month before the charge would be absorbed. No evidence was submitted to show what the revenue due solely to minimum charge would be under the proposed rates. The minimum charge will therefore be disallowed, and the company allowed to

increase its service charge 10 cents per month per meter to compensate for loss of revenue due to the elimination of the minimum charge. As there are approximately 1561 meters in service, this would provide an increase in revenue amounting to \$156.10 per month.

The company gave evidence to show that the average gross revenue per thousand cubic feet under the rates proposed would be \$2.35, and this appears reasonable. Applying this to the actual sales for the first three months of 1920 would give a revenue from sales of \$16,039.93 if the proposed rates had been in effect. The gross revenue for January, February, and March of 1920 would then have been —

Sales of gas.....	\$16,039.93
Service charge	1,170.75
Additional service charge.....	468.30
Sales of residuals.....	2,890.92
Gross revenue	\$20,569.90

The company's exhibit No. 1 shows the actual operating revenue for the three months of \$17,110.22, and it was further testified that the cost of coal would be \$8.25 after June 1st, an increase of 20 per cent over the cost of the first three months now being examined when the average cost of the coal was \$6.88 per ton.

Allowing all other costs to remain stationary, but applying the increase in the cost of coal to the expenses for these three months, the total cost would have been increased by \$1432.14, and the total expenses would then have been —

Operating expenses	\$17,110.22
Extra coal cost.....	1,432.14
Taxes	825.00
Uncollectible bills	75.00
Total expenses.....	\$19,442.36

Assuming a gross revenue for the three months of \$20,569.90, and total expenses \$19,442.36, would leave available for interest, dividends, and surplus \$1127.54. This would be \$4510.16 for the year. With these figures it is unnecessary to endeavor to reach an exact or even an approximate valuation. The fixed capital is carried on the books of the company as \$294,084.45 as of March 31, 1920.

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In its report for the year 1919 the company presents an inventory with a total of \$250,393.39, with certain items for contingencies and omissions for "non-physical values" amounting to about \$55,000. Deducting these items an approximate value of \$200,000 is arrived at. This includes about \$17,000 for working capital, materials and supplies.

The income of the company for 1917 shows a return of only $9\frac{1}{2}$ per cent on \$100,000 or about $4\frac{1}{2}$ per cent on probable value; that for 1918 shows about $3\frac{1}{2}$ per cent on probable value; for 1919 about $2\frac{1}{2}$ per cent, while the income on the present rates, if applied throughout the year 1920 on the basis of the return shown for the first three months of that year would show a quite substantial deficit.

If the rates requested had been in effect for the first three months of 1920, and allowing for the increase in the cost of coal, the company would have had available less than \$1200 for the period for interest, dividends, surplus, or at that rate throughout the year of \$4510.16.

The property is certainly worth not less than \$100,000 and this income would be but a return of 4.51 per cent on that valuation, or 2.25 per cent on the probable value of the property.

It would seem, therefore, that the increase in the rates asked for is reasonable and should be allowed.

Some criticism might be made on account of the large proportion of the consumers of the company who by the proposed rates are included in the first block, but while the proportionate increase is very heavy in some cases the results do not seem to give by any means a too large return to the company. At the present time costs are so high it seems best not to fix a rate in this case for a period of three years, but to fix it at a period of one year and until further order of the Commission.

With respect to the proposed penalty of 10 per cent to be added to the rate if bills are not paid by the 10th of the month following that in which the gas is

used, we believe it to be better practice to conform to the method of extending the privilege of a discount for prompt payment as in the schedules proposed to be superseded, rather than to attempt the imposition of a penalty for default in prompt payment. The penalty clause will therefore be disallowed from the rate schedule, and the company will be allowed to provide in place thereof an addition to the proposed rate of 10 cents per thousand cubic feet with a corresponding discount for prompt payment.

An order should therefore be made permitting the increase in rates as outlined in this opinion.

Chairman Hill and Commissioners Irvine and Kellogg concur; Commissioner Barhite absent.

In the Matter of the Complaint of JOHN J. A. ROGERS of the Incorporated Village of Hempstead, Nassau county, *against* NASSAU AND SUFFOLK LIGHTING COMPANY in respect to service pipe connection for gas at his residence in said village. [Case No. 7479.]

Where a prospective customer, entitled to service from a gas company under the law, makes written demand for such service to a building not connected with the gas main, he must, if required by the company, deposit a sum sufficient to pay the cost of laying the service pipe from the street line to the meter.

The company can not make any profit on the transaction, and it is not entitled to enforce a flat charge therefor. It can only properly retain or collect the reasonable cost of the installation actually incurred.

Decided June 17, 1920.

Appearances:

John J. A. Rogers, 972 Forest avenue, Ridgewood, Queens county, complainant, in person.

Henry MacDonald, 149 Broadway, New York city, for respondent.

KELLOGG, Commissioner:

This complaint is based upon the failure of the respondent to furnish gas to the complainant at his premises No. 132 Terrace avenue in Hempstead.

Hearing was had before Commissioner Barhite of this Commission, and on account of his illness and the desirability of an early decision, the matter has been referred to me for opinion.

It appears from the evidence that this complainant owning premises in Hempstead applied at the office of the respondent at Mineola for gas service. He deposited \$10 with the young lady in charge, taking a temporary receipt, for which thereafter the regular receipt of the company was substituted. This money was paid, as stated in both receipts, for "meter deposit". This deposit undoubtedly was made

under section 63 of the Transportation Corporations Law as security for payment of gas to be consumed.

The premises in question had not yet been connected with the street main, and controversy arose between the parties when the company demanded payment to it of \$25.20 for laying of the service main from the curb, a distance of 42 feet. The amount was claimed to be unreasonable by the complainant who stated that a plumber by the name of Gaffney had offered to perform the service for the sum of \$12.

The company at first refused to permit the plumber in question to make the connection for the reason that it could not be done profitably for that amount. This, however, would seem to be no adequate reason, as the cost of the installation would be a matter entirely between the plumber and the complainant, and would not be any affair of the respondent if the work were properly done.

Toward the close of the hearing the company's superintendent agreed that the work might be done by a plumber employed by the complainant if done properly and under the supervision of the respondent, and stated that it would arrange to have a representative present to supervise the work on twenty-four hours notice.

The main in question is what is known as a high pressure main, sustaining a pressure of fifty pounds to the square inch, and connections with it would have to be made with care and the observance of certain precautions in order to avoid danger.

The rights of the parties in this connection are fixed by section 62 of the Transportation Corporations Law. The complainant owning premises within 100 feet of the main of the respondent is entitled to be supplied with gas upon making a deposit to secure payment for consumption thereof, which he did. This right, however, is subject to the following further limitation contained in this section. He is not entitled to the gas supply unless he "if required, shall deposit in advance with the corporation a sum of money

sufficient to pay the *cost of his portion* of the pipe . . . required to be laid, and the expense of laying such portion”.

The “portion” under this statute to be paid for by the applicant has been held by the Attorney-General, in a well reasoned opinion, to be that portion of the pipe from the *street* line to the building to be furnished with gas, and that it is the duty of the company to pay the cost of laying service pipes from its main to the street line. (See Report of the Attorney-General of 1906, p. 424.)

It is quite true that in previous decisions of this Commission it has been asserted that the proper portion of the expense of laying a service main, to be borne by the prospective customer, is that portion thereof between the curb and his building. This was held in *Simpson v. Buffalo Gas Co.* 2 P. S. C. 2nd D. Rep. 531, and was followed as a general proposition in *Draney v. Central Hudson Gas and Electric Co.* 5 P. S. C. 2nd D. Rep. 334. The *Simpson* decision is based upon the principle as stated therein:

The pipe laid in the street becomes the property of the company and is included in its schedule of assets. The pipe laid on private ground becomes the property of the consumer and can be moved or removed by him without hindrance by the company.

This would seem to be the correct principle, but the application is not exact. The curb is not the line of demarkation between the private ground in which the pipe becomes the property of the consumer and the public street where the pipe remains the property of the utility company. The entire pipe line within the confines of the street, of which the sidewalks must be deemed a part, remains the property of the gas company, and it alone has authority under the law to make excavations to lay it. It would seem that the language of the statute, therefore, in apportioning the expense of installation of a service line, and in speaking of the word “portion” in connection with the cost to each of the parties, must be construed as intending to cast the burden of construction upon the parties respectively of the portions owned by each.

In view of the acrimony displayed upon the hearing, it is quite probable that the parties can not agree on any practical mode of operation looking to the construction of this service pipe, partly by the company to the street line, and the remainder by an employee of the complainant. In view of this attitude of the parties which is somewhat deplorable, it seems necessary that the provisions of the statute governing this situation should be applied so far as the order of this Commission is concerned.

The tariff filed by the respondent effective February 20, 1920, provides for a charge of 60 cents per lineal foot from the street line at the curb to the meter inlet. Computation of this charge for 42 feet resulted in the demand for \$25.20, which made the trouble.

The filing of a tariff providing for the payment of a definite sum can not alter the provisions of the statute requiring the service pipe to be constructed at cost. The company is not entitled to make any profit on this operation. (*Simpson v. Buffalo Gas Co. supra*, p. 545.) Neither should the applicant be charged for construction of this service pipe between the curb and the street line. The sidewalk is a portion of the street (*Sullivan Adv. Co. v. City of New York*, 61 Misc. 425, 429,) and the company under the statute, as correctly interpreted by the Attorney-General, must defray the cost of laying the pipe under the sidewalk as well as under the vehicle traveled part of the street.

The amount of sixty cents a lineal foot demanded by the respondent does not appear from the evidence to be unreasonable as a basis for computing the amount of a proper deposit.

Excluding the cost of construction under the sidewalk, a deposit of \$20 will be ample to comply with the provisions of the statute, and to secure the respondent for the reasonable cost of construction. If the cost be less, the complainant is entitled to a return of the balance unexpended.

Chairman Hill and Commissioners Irvine and Van Namee concur; Commissioner Barhite not present.

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Petition of NIAGARA AND ERIE POWER COMPANY under section 68, Public Service Commissions Law, for permission to construct an electric plant (extension) in the town of Dunkirk, Chautauqua county, and for approval of a franchise therefor received from said town. [Case No. 7527.]

The local authorities of the Town of Dunkirk in granting a consent or franchise to a lighting corporation for permission to erect and maintain wires and poles for conducting and distributing electricity over and under the streets and public places of the town, pursuant to the provisions of section 61 of the Transportation Corporations Law, imposed conditions which forbade the lighting company to furnish current to consumers whose requirements for power are less than 75 kw.; required the company to furnish current to consumers requiring 75 kw. or more, providing the company will receive a reasonable return upon the necessary investment; and prohibited the company from furnishing current to others for redistribution except to the Board of Water Commissioners of the City of Dunkirk.

Held, that such conditions are unreasonable and therefore not within the power of the local authorities to impose.

Decided June 15, 1920.

Appearances:

Strebel, Corey, Tubbs & Beals (by E. S. Tucker), Marine Trust Building, Buffalo, for petitioner.

Henry Waldorf, Temple street, Dunkirk, Town Superintendent of Highways, Town of Dunkirk.

HILL, Chairman:

This is a petition under section 68, Public Service Commissions Law, for permission to the applicant to construct in the town of Dunkirk, Chautauqua county, an electric plant for transmitting and furnishing to the public electricity for light, heat, or power, and for approval of the exercise of the rights and privileges under a franchise granted to said company by the Town Board of the Town of Dunkirk March 9, 1920.

By this franchise permission is given to the Niagara and Erie Power Company to construct, maintain, and operate necessary conduits, wires, etc., in, through, upon, under, and across all of the streets, alleys, highways, and public ways of the town of Dunkirk, for the purpose of transmitting electric power in and through said town, and for the purpose of using, distributing, and furnishing electricity for light, heat, or power to the said town of Dunkirk and the inhabitants thereof.

Certain conditions are embodied in the so called franchise which are unusual in character and require particular consideration, and in explaining the meaning of these conditions it should be stated that the city of Dunkirk is contiguous to the town of Dunkirk, and the permission and consent relate only to the town, which practically surrounds the city. The City of Dunkirk operates a municipal electric plant for both city and commercial purposes, and this applicant furnishes electric current to the city plant for its operations. It seems that the municipal plant desires to extend its activities outside of the city into the town.

The conditions to which reference has been made are: (a) that the applicant shall not sell or distribute electric current to any consumer in the town of Dunkirk whose requirements for power are less than 75 kw.; (b) that the applicant company will, upon the written request of the Board of Water Commissioners of the City of Dunkirk (said board being the controllers of the municipal lighting plant), furnish current to any consumer in the town of Dunkirk whose requirements for power are 75 kw. or more, "providing the company will receive a reasonable return upon the necessary investment"; (c) the applicant is prohibited from selling or furnishing electric current to any person, combination of persons, corporation, or combination of corporations which shall redistribute same or any part thereof, except to the Board of Water Commissioners of the City of Dunkirk; (d) that nothing in the franchise shall at any

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time be construed to prevent the Board of Water Commissioners from selling or furnishing electric current to any consumer in any quantity or for any purpose; (e) in any case where the Board of Water Commissioners are unable or unwilling to supply a consumer, then the applicant company shall serve such consumer, provided its requirements are less than 75 kw. and providing the company shall receive a reasonable return upon the necessary investment.

The applicant company is an electrical corporation, organized under and by virtue of the Transportation Corporations Law of the State of New York, and is now engaged in the sale and distribution of electricity in various places in the counties of Erie and Chautauqua, in the State of New York, and the petition states that it now proposes to sell and distribute electricity in the town of Dunkirk, Chautauqua county, New York, and has facilities therefor.

Section 60 of the Transportation Corporations Law provides for the organization of such corporations and their general purposes, which are the manufacture and sale of gas or electricity for producing light, heat, or power, and in lighting streets, avenues, public parks, and places, and public and private buildings. Section 61 provides that the erection and construction of the wires and poles for conducting and distributing electricity may be done over and under the streets, avenues, public parks and places of cities, towns, and villages with the consent of the municipal authorities, and in such manner and under such reasonable regulations as they may prescribe.

It follows, in the absence of other objections, that if the conditions above referred to are reasonable, the Commission should approve of the application; and it likewise follows that if on the contrary the conditions are unreasonable, the Commission should withhold its approval.

Section 62 of the Transportation Corporations Law provides that upon the application in writing of the owner or occupant of any building or premises within one hundred

feet of any main laid down by any gas light corporation, or the wires of any electric light corporation . . . the corporation shall supply . . . electric light to such applicant, upon certain conditions specified in the next following section.

An electric lighting corporation is a common carrier and may not discriminate between its customers, and the terms and conditions of service must be common to all and without discrimination, and as a consequence all individuals have equal rights, both with respect to the service and charges of such corporations. (*Anan Packing Co. v. Edison Illuminating Co.*, 115 A. D. p. 51.)

It would seem, therefore, that any condition or regulation imposed by the local authorities which interferes with the plain spirit of the statute must be considered an unreasonable regulation, otherwise the powers of the Legislature are transferred to or usurped by the local authorities. The rights of such corporations to use the streets are granted to them by the State, subject to the imposition of reasonable regulation by the local authorities. A corporation securing such rights acquires them subject to certain important obligations defined in the statute, one of which is the requirement that it shall furnish current to all applicants within one hundred feet of its lines, on reasonable terms. By virtue of the conditions contained in this franchise, however, assuming them to be effective, the company would be freed from this obligation, and the discretion of the Board of Water Commissioners would be substituted for the requirements of the law.

The view of the Commission is that in general any given territory should be supplied by a single distributing company, which, so long as it complies with the law and gives satisfactory service, should be protected in that territory against the encroachment of other companies. If the Board of Water Commissioners is lawfully giving satisfactory service in any territory in the town, it would be reasonable and

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proper to protect it in such territory. It is quite a different thing, however, for that board to have reserved to it the power of determining whether it or the applicant company shall supply particular customers in the same territory.

The provision limiting the obligation of the applicant company to furnishing current to cases where it will receive a "reasonable return on the investment," is also objectionable. No such provision is contained in the statute, and no such issue is brought into play when an application for service is made under section 62 of the Transportation Corporations Law, which itself provides the conditions upon which service is to be rendered.

For the reasons stated the application is denied.

Commissioners Irvine, Kellogg, and Van Namee concur ;
Commissioner Barhite not present.

Petition or Complaint of JAMESTOWN STREET RAILWAY COMPANY under subdivision 1, section 49, Public Service Commissions Law, and section 181, Railroad Law, for permission to increase passenger fares. [Case No. 7524.]

Decided June 22, 1920.

Appearances:

Frank H. Mott, Jamestown, attorney for Jamestown Street Railway Company.

Dean, Edson & Jackson (by Robert Jackson), Jamestown, attorneys for Warren and Jamestown Street Railway Company.

Samuel F. Carlson, Mayor of the City of Jamestown.

Ernest Cawcroft, Corporation Counsel of the City of Jamestown.

Members of the Board of Aldermen of the City of Jamestown as follows: *Messrs. Love, Gustafson, Carlson, C. A. Anderson, F. V. Anderson, Peterson, Halfquist, Duell, Weston, Lown, Appleby, and Porter.*

HILL, Chairman:

Jamestown Street Railway Company operates a street surface trolley railroad in the city of Jamestown and its environs, the various branches extending to nearby suburban points beyond the city line; the total single track mileage is about 29 miles; a unit fare has always been charged, no zones having ever been established. The company desires to continue this plan of rates, and the patrons of the line seem also to favor it. Originally a straight five cent fare was charged, but by order of the Commission made July 15, 1919, a seven cent cash fare was authorized on condition that tickets should be available to passengers at five cents each in quantities of ten for fifty cents and twenty for one dollar. The railroad has not been a financial success; the gross

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income for the year 1918 fell to \$32,186 with which to meet fixed charges of \$102,202, leaving a net corporate deficit of \$70,016. In 1919 the operating results were as follows:

Passenger receipts	\$308,428	
Non-operating income:		
Sale of power.....	177,546	\$485,974
Operating expenses		418,920
Gross income		\$72,054

For the first quarter of 1920, however, a gross income of \$29,337.67 was shown, and as this was a winter quarter and therefore somewhat under the average, the three months' operation promised a decided improvement for the year over 1919, notwithstanding the operating expenses failed to reflect any item for deferred maintenance, and the items for current maintenance are unduly low owing to actual expenditures being kept to a minimum of requirement and no accrual being made to depreciation account. This rate of income can not, however, be even approximately attained by reason of certain heavy increases in operating expense which now confront the company and which are the occasion for this application. One item of increase is the sum of at least \$55,000 per annum which has already been granted in the form of a wage increase effective June 1st, and another is a very sharp advance in the price of coal, of which the company consumes about fifty tons per day. At current prices this advance is estimated at \$80,000 per year. The highest wage in the increased scale is 50 cents per hour, and the president of the company testified that the increase was absolutely necessary in order to keep the men from leaving to secure more profitable employment, and that in his opinion the increases were reasonable. It appears also that in the past five years maintenance and depreciation have been neglected, insufficient expenditures having been made for the one, and no substantial reserve having been set aside for the other.

The petition asks that the cash fare be increased to ten cents with a ticket fare of seven and one-half cents. The

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mayor and members of the city council appeared in person at the hearing, together with the corporation counsel, and objected to so great an increase, while conceding that a substantial increase was necessary. A general desire was manifested to arrive at a rate of fare which the local authorities would feel justified in not opposing, it being felt that in this wise public opposition would be lessened and litigation avoided. While the authorities did not in terms consent to any specified rate, they concluded that if the company would be content with a seven cent ticket fare, five tickets to be sold for thirty-five cents, the cash fare to be established at eight cents, the city would consent that the record be closed, which would result in the rates being fixed by the Commission upon the evidence then before it. This was agreed to on the part of the company and the record was closed.

The number of passengers carried in 1919 was 5,373,337 at five cents, and 608,148 at seven cents. Assuming the same experience for 1920 at the increased rates last mentioned, which assumption seems very favorable to the company, the passenger revenue for one year would be as follows:

5,373,337 @ 7¢.....	\$876,134
608,148 @ 8¢.....	48,652
	<hr/>
	\$424,786
Assume power earnings equal to previous year.....	177,546
	<hr/>
Total estimated gross revenues, 12 months.....	\$602,332
<i>Operating expenses (estimated):</i>	
For 1919	\$413,920
Increased wages	55,000
Increased cost of coal.....	80,000
	<hr/>
	548,920
Apparent gross income.....	<hr/>
	\$53,412

This takes no account of an increased allowance for maintenance and depreciation, nor for deferred maintenance, which properly made would absorb a considerable portion of the apparent balance. Neither does it allow for any increase or decrease in the number of riders, it being assumed that the normal growth in traffic will be about offset by decreased riding due to increased fares.

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The balance sheet at March 31, 1920, condensed, shows:

<i>Assets:</i>	
Road and equipment.....	\$1,198,320.13
Investments in affiliated companies.....	504,807.10
Cash	302.00
Loans and notes receivable.....	1,508.61
Miscellaneous accounts receivable.....	474,770.13
Materials and supplies.....	4,019.56
Other current assets.....	28,938.56
Unadjusted debits	25,982.09
Profit and loss balance.....	852,144.36
Total assets	\$2,590,792.54
<i>Liabilities:</i>	
Capital stock	\$250,000.00
Funded debt	800,000.00
Loans and notes payable.....	884,908.19
Accounts payable	1,413,726.72
Other current liabilities.....	4,500.00
Accrued depreciation	287,657.63
	\$2,590,792.54

The interest on funded and unfunded debt for the quarter mentioned was \$30,720.49, or at the annual rate of \$122,881.96, so that assuming the apparent gross income of \$53,412, there will be a net corporate deficit for twelve months under the new rates of \$69,470.96.

There seems no necessity of further analyzing the capital account, because on the lowest valuation or rate base which is conceivable it is apparent that no excessive return is possible. Enough has been shown fully to justify the proposed rate increase (seven cent ticket fare, eight cent cash fare), and an order will be entered authorizing the initiation of such rates on three days' notice.

All concur.

Petition of the STATE COMMISSION OF HIGHWAYS under section 91 of the Railroad Law for an alteration in the crossing at grade of a state highway and the Delaware, Lackawanna and Western railroad near D. L. & W. Junction in the town of Pavilion, Genesee county. [Case No. 5088.]

1. *Division of Cost:* In apportioning the cost of eliminating grade crossings, the Railroad Company while under Federal control is entitled to its regularly filed rate for transporting cinders, although it might, upon application, have procured the consent of the Interstate Commerce Commission to a lower rate.

2. *Apportionment of Cost; War Tax:* The State must bear its share of the war tax on transportation of material for the elimination of grade crossings.

3. *Apportionment of Cost; Repairs to Machinery:* The cost of repairs to locomotives and work equipment is a proper charge against the work of eliminating grade crossings, part of which is to be apportioned to the State.

4. *Power of Commission; Interest:* Under the New York State Railroad Law, the Commission, in apportioning the cost of the work of eliminating grade crossings, can only fix the interest on each item from the date of expenditure until the date of accounting, and has no power to determine whether or not interest should be deducted by reason of delay in the work.

Decided June 22, 1920.

Appearances:

W. Wilmarth, clerk, Albany, for the State Commission of Highways.

Douglas Swift, 90 West street, New York city, attorney and George E. Boyd, division engineer, and Milo Singer engineer, Buffalo, for The Delaware, Lackawanna and Western Railroad Company.

VAN NAMEE, *Commissioner:*

In this case, under the petition of the State Commission of Highways, upon order of this Commission a grade crossing

of the Delaware, Lackawanna and Western on the Buffalo division of that railroad in the town of Pavilion in Genesee county over state highway route 16, section 10, was abolished, and travel was diverted therefrom to a new undergrade crossing constructed at a point about 475 feet easterly of the old crossing.

According to law the work was to be done by the Railroad Company. The Highway Department paid for a right of way which was necessary by reason of the change of the road. The cost of the elimination was to be borne jointly by the Railroad Company and the State out of highway improvement funds under subdivision 4 of section 94 of the Railroad Law.

The work has been completed, and on November 8, 1919, the Highway Department accepted the work performed as satisfactory. On November 25, 1919, this Commission approved the work. From the beginning of the operation differences arose between the Railroad and the Highway Commission in relation to various items of cost and interest submitted by the Railroad on estimates looking to an intermediate accounting during the progress of the work. No intermediate accounting, however, was ever had.

Finally, the parties being unable to reach a satisfactory settlement, this Commission by an order made the 27th day of April, 1920, cited both parties to appear before it at a hearing to be held in Albany on the 12th day of May, 1920, for the purpose of a final accounting of the whole matter. At this hearing, which was held before Commissioner Van Namee, there was no dispute as to the amount expended by the Highway Department. Such amount was \$1460.26 with interest from the date of expenditure on each item amounting to \$250.01 to the first day of December, 1919, making a total amount of \$1710.27.

The claim of the Railroad was for total disbursements \$91,194.27 which, with interest on each item from the date

of expenditure to December 1, 1919, of \$6131.39 makes a total of \$97,325.66.

The Department claims this total should be reduced for various items as follows:

1. Overcharge on freight for cinders.....	\$520.00
2. Charge for war tax.....	\$75.15
3. Charge for repairs to equipment.....	\$22.43
4. Overcharge on interest in 5th estimate.....	\$417.82
5. Overcharge on interest in 1st estimate.....	\$111.03
6. General charge for interest by railroad during time construction was suspended.	

Taking these up in their order:

1. The Railroad Company charged on hauling 650 tons of cinders, which were used in the work, a rate of $7\frac{1}{2}$ cents per hundred weight or a total of \$975. The Highway Commission claims the Railroad should have requested and would have received a commodity rate of 70 cents per net ton as per D. L. & W. I. C. C. 15731 which, if procured, would have made the charge \$455. Hence the Commission claims a reduction of \$520, the difference in these rates.

Tariff 15731 is a commodity tariff and applies to five specific commodities, namely trap rock, mine rock, broken stone, crushed stone, and screenings. This does not include cinders. The rate applicable to cinders is in the 6th class, and that rate is $7\frac{1}{2}$ cents, the rate above.

If the Railroad Company had made a claim as suggested and the Interstate Commerce Commission had allowed it, the share of the State in this proceeding would have been reduced \$360. It is regrettable this result was not brought about, but it must be remembered it was a matter of business judgment and the Railroad has actually paid to the Federal Railroad Administration this money. It, as a Railroad Company, makes no profit on the rate charged. If this final accounting and settlement were to be delayed for this claim to be made in Washington, final settlement of this whole matter would be greatly delayed and questions of allowance of interest during such delay would arise.

In view of the smallness of this item in a transaction

involving approximately \$100,000 it is deemed best to let it stand as claimed by the Railroad. The Railroad should be diligent in obtaining such reductions of freight charges in these matters and the allowance of this item must not be construed as establishing a general rule or precedent. It is only allowed in this case because of the attendant circumstances.

2. A war tax amounting to \$75.15 on shipments of freight that were consigned to and used by the Railroad Company in this work. This the Highway Commission objects to on the ground that the work having been done for the State, no tax should be imposed.

Subdivision 8 of section 500 of the Federal Tax Law, relating to the war tax on transportation, says: "No tax shall be imposed under this section upon any payment received for service rendered to the United States or to any State or territory or the District of Columbia. The right to exemption under this subdivision shall be evidenced in such manner as the Commission, with the approval of the Secretary, may by a regulation prescribe." The Commission of Internal Revenue has issued regulations on that subject and among others issued this regulation: "Amounts paid for the transportation of freight or persons which are finally paid by the Government under cost plus contracts are exempt from tax."

It is quite obvious that these freight charges are not exempt from tax because they are not to be paid ultimately and wholly by the State. The service was performed by the Railroad Company, and while it has already paid the freight charges, the work is to be paid for half by the State and half by the Company, and clearly it does not come under the exemption allowed by the subdivision in question. The claim of the Railroad is therefore allowed.

3. A charge on three small items totaling \$22.43 included by the Railroad to cover repairs to locomotives and work equipment used in the work.

This is objected to, but it would seem that it is properly one of the expenses of the undertaking, being the cost of maintaining the carrier's own equipment while used in the service. The Highway Commission claim should be disallowed, and the item allowed to stand.

4. An item of \$417.82 interest charge on the first statement by the Railroad but objected to by the Highway Department.

This item was waived by the Railroad and corrected in the fifth estimate. [Minutes, pages 48, 49.]

5. An item of \$111.03 for interest on the amount of the first estimate. The Highway Department claimed this to be a charge of interest upon interest, and the amount was waived by the Railroad Company. [Minutes, pages 48, 49.]

6. The Highway Department contends it should not pay interest from the date of the beginning of this construction because there were times during the period when no work was done by the Railroad.

An examination of the correspondence shows that there was delay on both sides. The State Highway construction bids had to be readvertised and the road construction was delayed over a year and was finally completed by the Highway Commission with its own forces. For a portion of the period the railroad was under Federal control and the country was at war. The Railroad had built a part of the false work and had expended its money for the steel necessary for the construction, and the steel was on the ground, but on account of shortage of labor and more necessary work elsewhere this work was not progressed for some time. During the year 1917 very little was done. The roadway was not complete until the Spring of 1918, and if the crossing had been complete it could not have been used before that time.

I believe it would be unprofitable to attempt to decide when and for how long a period the work was delayed and whether such delay was on the part of the Highway Com-

mission, the Railroad Company, the Federal Railroad Administration, or the general state of the country.

The Commission, moreover, has heretofore considered and decided this matter of interest. (*In the Matter of Mayor of Yonkers and New York Central R. R.*, 2 P. S. C. 1920, Opinion No. 498; see also *Matter of Petition of State Commission of Highways*, 182 A. D. 108.) It has no power to determine whether or not by reason of the delay, whether it was willful or not, interest should be deducted. It can only apply the law which provides (subdivision 7, section 94, Railroad Law) that both parties are entitled to interest on each item from the date of expenditure until the date of accounting.

Interest has been figured on each item from the date of expenditure to December 1, 1919, by both the Railroad Company and the Highway Department, and such interest should be allowed. No actual accounting was had until May 12, 1920, the date of the hearing before the Commission, and interest should also be allowed to that date. Thereafter a reasonable time should be allowed the State for the purpose of examining the accounts without the payment of additional interest. What is a reasonable time must depend upon the circumstances of each case.

Under all the circumstances no interest should be allowed either party from May 12, 1920, to July 15, 1920, which will include the date of the rendering of this Opinion and a short time thereafter within which final settlement can be made. That is, if final settlement is made by or upon July 15, 1920, the share of the Highway Department should be figured as follows:

Principal sum expended by Railroad to December 1, 1919	\$91,194.27	
Interest to May 12, 1920	8,521.42	
		\$99,715.69
Less principal sum expended by Highway Department	\$1,460.26	
Interest to May 12, 1920	289.37	
		1,749.63
To be divided between Railroad and Highway Department ..		\$97,966.06
Due by Highway Department to Railroad Company (½ of this amount)		\$48,983.03

Thereafter, the interest having been merged in the account, it becomes a part of the indebtedness (*Devlin v. Mayor, etc.*, 131 N. Y. 123, 125), and both are then in one item, with much of the character of a judgment, and in event of the failure or refusal of the Highway Commission to pay, the Railroad Company is entitled to interest on such item or sum, in this case, \$48,983.03, from July 15, 1920, to the date of payment.

An order has been made accordingly.

All concur.

No. 518 : 341

Petition or Complaint of HUDSON VALLEY RAILWAY COMPANY under subdivision 1, section 49, Public Service Commissions Law, and section 181, Railroad Law, for permission to increase passenger fare on its railroad. [Case No. 7070.]

1. A provision in a franchise granted by a municipality to construct an interurban electric railroad on the streets of the municipality, purporting to restrict the rate of fare to be charged between that municipality and points outside thereof, does not preclude the Commission in a proper case from fixing a higher rate.

2. A municipal franchise restricted fare on a street railway within the municipality to 5 cents, a later franchise provided that "the rate of fare as now established on said line and said service to be maintained as long as the patronage will warrant".

Held, That, on an application for a higher rate, the Commission might authorize the same if it should determine that the patronage no longer warrants the 5 cent rate.

3. The revenues and expenses of the Hudson Valley Railway Company again examined, and the rate of 7 cents in each zone authorized.

4. In fixing rates upon an interurban railroad it is not necessary to consider separately value, revenue, and expenses attributable to each village or city through which the road passes.

Commissioners Kellogg and Van Namee dissenting.

5. The evidence sufficiently discloses that operations on the urban system of the Hudson Valley Railway Company in the city of Glens Falls are not compensatory at the rate of 6 cents.

Commissioners Kellogg and Van Namee dissenting.

Decided June 24, 1920.

Appearances:

James McPhillips, Glens Falls, and *H. T. Newcomb*, New York city, for petitioner.

Edward C. McGinity, City Attorney, Mechanicville.

Daniel J. Finn, Glens Falls, attorney for W. G. Brayton and *Daniel J. Linehan*, minority members of the Common Council of Glens Falls.

Ersline C. Rogers, Hudson Falls, (by *John E. Sawyer*) for the Board of Trustees of Hudson Falls.

Edward M. Angell, Glens Falls, for the Chamber of Commerce of Glens Falls.

Edward S. Coons, Village Attorney, Ballston.

IRVINE, *Commissioner*:

The Hudson Valley Railway Company was, November 19, 1918, authorized to increase its passenger fares from 5 cents to 6 cents in each fare zone. It now makes application for a further increase from 6 cents to 7 cents. In the Opinion of Commissioner Cheney in the former case (7 Public Service Commission Reports, 2nd District, 287) the road and its operation are sufficiently described, and some matters equally pertinent to the present case are therein discussed.

Franchise Restrictions. In the case of some municipalities concerned there are fare restrictions embraced in franchises. At the time of the earlier case these communities had waived the restrictions so far as to permit the authorization of a 6 cent fare. The cities of Glens Falls and Saratoga Springs have again waived the restrictions contained in their franchises so far as to permit a determination of the present application upon its merits. The franchise under which the applicant operates in the village of Hudson Falls undertakes to restrict the fare for a continuous ride "between any point within the village of Sandy Hill, now Hudson Falls, and any point outside of the said village" to 6 cents. The franchise in the village of South Glens Falls undertakes to make a similar restriction "for a continuous ride from South Glens Falls to any portion of Glens Falls". As these restrictions seek to regulate rates outside the municipal limits they fall within the rule declared *In the Matter of Schenectady Railway Company* [case No. 6853], decided May 20, 1919; *Complaint of Wilkinson against New York State Railways*, decided November 25, 1919; *Matter of United Traction Company*, decided January 22, 1920; and in the Opinion of Justice Hinman *In the Matter of the Application of Koehn against Public Service Commission*, 107 Misc. 151. Attention has not been called to any other possible restrictions except in the village of Ballston Spa. There is in the record a certified copy of a franchise granted May 27, 1890, to the Saratoga Electric Railway Company, a predecessor of the

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applicant, containing this provision "No greater rate of fare than 5 cents for one continuous fare from point to point between Ballston Spa and the Saratoga Springs town line shall be charged or collected by said company, its successors or assigns". This would fall within the same rule. In the brief of the petitioner reference is made to a franchise to the Saratoga Traction Company with a direct 5 cent limitation; and also to one granted to the petitioner March 13, 1911, providing "the rate of fare as now established on said line and said service to be maintained as long as the patronage will warrant". It would seem that this last grant to the petitioner modified any previous rate restrictions to the extent indicated, and leaves for the determination of the Commission the question whether the patronage still warrants a 5 cent fare within the village.

General Operating Results. It is still true, as it has been since the organization of the applicant in 1901, that the revenues of the company are insufficient to pay operating expenses, taxes, and interest. We have in the evidence income accounts for each year, but it will be sufficient to present here merely a condensed income statement for 1914, generally considered the last strictly normal year; for 1917, upon which the calculations in the former case were based; for 1918 and 1919, the 6 cent rate having been in force for the entire year of 1919. Following is the table:

	1914	1917	1918	1919
	<i>Dollars</i>	<i>Dollars</i>	<i>Dollars</i>	<i>Dollars</i>
Passenger revenue.....	571,907.74	578,079.66	605,136.90	773,036.08
Total from transportation.....	584,574.22	630,008.91	741,014.80	917,139.13
Total railroad revenue.....	662,809.31	702,374.15	803,343.62	971,357.38
Operating expenses.....	478,169.96	521,101.08	695,153.29	815,891.98
Net operating revenue.....	184,439.35	181,273.07	108,190.33	155,465.40
Taxes.....	39,633.34	42,178.20	46,062.87	51,530.56
Operating income.....	144,806.01	139,094.87	62,127.46	103,934.84
Gross income.....	147,828.53	143,680.21	67,732.67	109,586.39
Deductions from gross income...	236,754.74	248,558.67	261,896.33	330,291.66
Net income railway.....	*88,986.81	*104,878.46	*194,163.66	*280,705.87
Income Mechanicville power plant.....	78,585.53	91,638.96	75,799.74	*16,190.97
Net income available for dividends.....	*10,340.68	*13,239.48	*118,363.98	*296,896.84

* Deficit.

It is rather startling to observe that the passenger revenue, estimated in the former Opinion to increase probably \$88,000 and theoretically \$115,000, actually increased in 1919 \$194,956.42 as compared with 1917. This indicates a considerable increase in the number of passengers carried. The actual increase was 826,159. Operating expenses have increased \$294,770.90. The net deficit from railroad operations was in round numbers \$116,000 greater in 1919 than in 1917. Of this increase about \$9000 is represented by increase in taxes.

While the Commission has become familiar, through investigations in other cases and from the reports of all companies, with the generally large increases in operating expenses, especially in wages, the increase here is so great as to challenge minute inquiry. For this reason and also because of various criticisms, some advanced by counsel for the opponents of the application and others less formally presented through the medium of newspapers, the operating accounts and practices of the company have been subjected to a closer examination than is usually employed or even practicable in similar cases. Ordinarily criticism in public print not sustained by evidence presented at the hearing is and should be disregarded, but in this case such criticisms seemed to reflect widely entertained opinions in several communities, and if sustained by the facts were in some instances of such serious import that it seemed proper to explore thoroughly the subjects involved.

Operating Expenses. The following table gives a summary of operating expenses for 1910, 1917, 1918, and 1919:

	1910	1917	1918	1919
	<i>Dollars</i>	<i>Dollars</i>	<i>Dollars</i>	<i>Dollars</i>
Maintenance of way and structures.....	88,979.27	107,218.32	121,607.77	129,278.72
Maintenance of equipment.....	46,691.03	64,239.57	80,411.71	98,126.80
Power.....	83,941.86	120,309.98	163,242.26	192,334.74
Conducting transportation.....	129,031.53	161,825.59	233,297.60	280,560.55
Traffic.....	3,041.42	3,110.17	3,005.02	3,207.27
General and miscellaneous.....	69,567.16	64,397.45	93,588.93	112,383.90
Total operating expenses.....	421,252.27	521,101.08	695,153.29	815,891.98

Maintenance of Way and Structures. The increase in labor expense and in the cost of materials is such as to indicate that the increase in this item is more than accounted for by these two factors. The unit increases are no greater than generally prevail.

Maintenance of Equipment. The item for 1919 includes \$10,075 for depreciation. The increase in other respects is entirely accounted for by increased costs of labor and materials. The increase in these costs reflects only the general situation in that respect. The depreciation charge is certainly not excessive on a system maintaining 113 cars.

Power. The transactions of the company in respect of power are somewhat complicated, and perhaps for that reason have aroused much criticism due to ignorance of the situation rather than to definite information. The company produces, purchases, and sells electric energy. The production is at the plant owned by The Delaware and Hudson Company at Mechanicville. This is leased to the Hudson Valley Railway Company at a rental of \$51,000 per annum. Surplus power is sold to different purchasers, chief among which have been the Adirondack Electric Power Corporation, the Schenectady Railway Company, and The Delaware and Hudson Company. Power to a certain extent is also purchased from the Adirondack Electric Power Corporation. The energy purchased is produced by water power, and is purchased at less than the Hudson Valley can produce it for its own use at the Mechanicville steam plant. The reciprocal arrangement for purchase and sale of power between the Adirondack Corporation and the Hudson Valley is brought about because of varying conditions of supply and demand. The chief criticism lies in the operation of the Mechanicville plant and the suspicion that The Delaware and Hudson Company derives an unjust advantage through its lease to the Hudson Valley Company. Color is lent to this by the fact that the United Traction Company is in practical control of the Hudson Valley Company by stock ownership and The Delaware

and Hudson Company in turn by like stock ownership controls the United Traction Company. There have been submitted to the Commission in response to a request detailed statements showing the operating statistics of the Mechanicville plant. It is practicable only to state results of the examination of these statistics. Operation was commenced by the Hudson Valley in 1913. Following is the net income by years to the Hudson Valley Company:

1913.....	\$38,968
1914.....	\$78,586
1915.....	\$37,737
1916.....	\$63,448
1917.....	\$91,639
1918.....	\$75,800
1919.....	\$15,181-D

It will be observed that there has been a substantial income which has gone to reduce the company's deficit each year except in 1919 when there was a deficit of \$15,181. This was the result of the cancellation of a contract by the Adirondack Electric Power Corporation for stand-by power service. There was paid in 1918 by the Adirondack Corporation for this purpose \$218,814.19. There was paid in 1919 by the Adirondack Corporation for power purchased only \$36,932.67. The Commission is informed that large purchases are again being made by the Adirondack Corporation. If this market, however, should cease and no other market be provided, it is evident that the continued operation of the Mechanicville plant would be undesirable. So far, however, it has been a distinct net asset.

The annual report of the Hudson Valley Company for 1918 shows an average power expense per revenue car-mile of 15.054 cents; in 1919, 14.5 cents. This, as compared with other electric railroads, is large indeed, but the result was evidently obtained by dividing the entire expense of producing and purchasing power, \$300,374.50, by the number of car-miles operated, 1,995,240, in 1918. No credit is given for power sold, amounting to about \$375,000. This charges the entire cost of power to revenue car operation, and is based on an aggregate power supply of 33,735,800 A. C.

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kw.h. Of this only 9,300,900 kw.h. was used for railway purposes. If we divide this by the number of car-miles we obtain 4.68 kw.h. per car-mile; and if we divide the entire power cost by the aggregate number of kw.h. we obtain a cost .89 cents per kw.h. as cost of production. This, multiplied by the power per car-mile, gives 4.97 cents as the actual power expense of railroad operation. This compares with 5.95 cents for the Schenectady Railway; 4.10 cents for the Fonda, Johnstown and Gloversville; and 2.69 cents for the Western New York and Pennsylvania Traction Company. The last named company generates power by natural gas produced at its own wells. The average power expense per revenue car-mile of all the electric railroads in the second district in 1918 was 4.5 cents. While, therefore, the expense on the Hudson Valley seems to be somewhat above the average it is less than that of a comparable road in the neighborhood, and is not so great as to indicate an extravagant system or outlay for the production of electrical energy.

Conducting Transportation. This account includes wages of motormen and conductors, commonly called platform expenses, and shows just about the increase in wages common to all industries in the period covered. The wages paid now, 45 cents an hour to men longest in service, is not higher than the generally prevailing rates. This single item accounts for \$128,735 of the total increase in operating expenses since 1917, but it is an increase which could not be avoided even if it were thought desirable that it should have been avoided. The increase since 1916 in motormen and conductors' wages amounts to 111 per cent. The increase in wages of employees maintaining equipment was 117 per cent and of those engaged in maintaining ways and structures 48 per cent.

Traffic. This item has changed very little and is inconsiderable in amount.

General and Miscellaneous. This account also shows a marked increase over 1917. The increase is about \$48,000

of which about \$18,000 is in "accidents and damages". This item naturally fluctuates considerably but here again the general tendency has been upward.

There has been an increase in the salaries and expenses of general officers. This item has in some quarters been looked upon with suspicion, and indeed attention has been called to one public statement intimating without direct assertion that the president receives a salary of \$75,000 a year. As a matter of fact the general officers are substantially the same as the general officers of the United Traction Company and The Delaware and Hudson Company, and the salary of each of these common officers is pro-rated among the companies served. The entire item for 1919 chargeable to the Hudson Valley is \$13,267. This is certainly small for so large a system. It is considerably smaller than the corresponding item even in 1917 for any of the larger electric railroads in the State. There has been an increase of about \$10,000 in the salaries and expenses of general office clerks. Certainly this class of employees is entitled to equal consideration with others in adjusting pay in such a manner as to meet the increased cost of living.

Waterford Bridge, Routeing of Cars. The cars of the Hudson Valley Company obtain entrance into the city of Troy over a highway bridge across the Hudson River connecting Waterford with North Troy. The cars then proceed over tracks of the United Traction Company to the Union station. The bridge is now owned by the State, but the toll arrangement is the same as before the State acquired the property. This is by virtue of a contract whereby the United Traction Company pays an annual rental of \$3280 for 240 cars crossing daily. For each car in excess of 240 a charge of 5 cents per car is made. The United Traction Company charges the Hudson Valley Railway Company at a rate of 2½ cents per car for the use of the bridge. The average yearly rental paid by the Hudson Valley has been \$343. Instead, therefore, of this arrangement being a drain on

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the company's resources the expense in nominal. In this connection it has been suggested that that expense could be saved by abandoning the use of this bridge and crossing the Mohawk from Waterford to Cohoes, entering Troy over the Green Island bridge. It is quite evident that such an arrangement would inevitably result in higher bridge rentals. The tracks of the United Traction Company would be used on the west side of the Hudson for a somewhat greater distance than they are now used on the east side. The cars of the United Traction Company handle the local traffic on either side, and no possible advantage has been suggested beyond that supposed to result from the reduction of the bridge rental.

Thomson Bridge. A bridge of the Greenwich and Johnsonville Railway is used for operation by the Hudson Valley at Thomson. The rental for this bridge is \$2000 a year or at a toll rate of 12½ cents a car. This is certainly very high as compared with the toll rate at Waterford, but the cost is not so great as would be the interest on the investment and cost of maintenance of a separate bridge. The entire amount is too small to have any effect on rates.

Troy Trackage. The Hudson Valley Railway Company pays the United Traction Company an amount equivalent to one-half of each passenger fare within the city of Troy for the use of its tracks between the Union station and Waterford bridge. The average distance is about 5 miles, and the total amount paid in 1919 was about \$14,300. It is probable that here the United Traction Company obtains a certain advantage, but should the item be scaled to what the Commission might think a fairer adjustment the difference would be very slight as compared with other necessary operating expenses.

Ballston-Saratoga. The Hudson Valley formerly operated over its own line from Ballston Spa to Saratoga Springs. It now operates over tracks of The Delaware and Hudson Company. Cars of the Schenectady Railway Company also operate over this line. The arrangement between the

Schenectady Railway Company and the Hudson Valley is such as to make the operation of the Schenectady cars, financially speaking, Hudson Valley operation, that is to say, the Hudson Valley receives the gross revenue of the Schenectady cars on this part of the route and pays all operating expenses. The arrangement between the Hudson Valley and the Delaware and Hudson is that the Hudson Valley pays as rental for the use of the tracks the entire operating income received from that portion of its operation. This at first appears unfair, but it does not operate as a burden on passengers. The amount paid in 1919 was \$16,923. There are two well constructed tracks. If the 1919 rental be capitalized on the basis of an 8 per cent return it will represent an investment of about \$211,537 or about \$32,200 per mile of double track. This is considerably less than the investment required by such a line. The result of the arrangement with the two companies is that the Hudson Valley obtains no direct financial advantage from operation on this part of the road. But it is a comparatively cheap method of reaching Saratoga Springs and so connecting operations between that point and points north with its road to the south. It thereby obtains additional revenues from other parts of its system by means of through operation and convenience to travel.

Conclusions. The examinations made of the operating expenses have been much more detailed than indicated by this Opinion. Especially has critical analysis been made of the payrolls. The items open to criticism it will be observed are few in number and not large in amount. If we should deduct \$100,000, an amount entirely too large, as representing excessive expenditures, there would still be an operating income of only \$204,000 and a net deficit of \$120,000 without counting last year's losses on the Mechanicville power plant. We are still without a reliable appraisalment of this property. In the former case a minimum value of \$5,000,000 was assumed. As stated in Commissioner

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Cheney's Opinion "Certainly no one could complain of this valuation except the company itself". If we make the deduction of \$100,000 from operating expenses, leaving an operating income of \$204,000, and add to this non-operating income of less than \$6000, we would obtain a theoretical gross income of about \$210,000 or a return of 4.2 per cent on the estimated value of \$5,000,000. These are extreme figures and are not used to indicate the real return but merely to demonstrate beyond possible doubt the right of the company and its real need of an increased revenue. There was some discussion on the subject of supposed overcapitalization. While it seems impossible to convince the public that the basis of rate regulation consistently pursued by the Commission has been such as to prevent the imposition of rates to pay interest or dividends on "water" it ought to be observed that this investigation has proceeded entirely regardless of the face value of outstanding securities. The operating income accounts above tabulated deduct actual interest payments, not to determine the income, but from the income as determined, and show a marked failure to meet these obligations. Even the necessity of meeting them has not been considered in reaching the result. Assuming no decrease in the number of passengers, and operating expenses to remain as in 1919, a rate of 7 cents would yield an operating income of about \$232,000 or approximately $4\frac{2}{3}$ per cent on the assumed minimum value of \$5,000,000, and would fail to meet fixed charges by about \$100,000.

Glens Falls-Fort Edward Operations. The company operates a local system in the city of Glens Falls. The villages of Hudson Falls and Fort Edward are in the same neighborhood. It is about three miles from Hudson Falls to Glens Falls and about two miles from Hudson Falls to Fort Edward. As there is considerable local traffic in Glens Falls and comparatively heavy traffic between Fort Edward, Hudson Falls, and Glens Falls those communities believe that operations in that part of the system, if segregated from

the rest, would show a profit and warrant a lower fare proportionately than on the remainder of the system. Statistics have been called for and produced upon this subject with allocations and apportionments made as fairly as possible, but, of course, not with real exactness. The surprising result is reached that of the railway deficit in 1919 of \$220,705, \$95,973 arose in the Glens Falls-Fort Edward zone. This calculation gives full credit to revenues from interurban passengers riding through or in that zone. It is possible as suggested that one of the Glens Falls lines may be profitable while others are not. No practicable method has yet been suggested of differentiating urban fares on such a basis. The conditions of urban travel do not permit an adjustment of fares in proportion to the cost of service to each passenger or to each class of passengers. On the evidence before the Commission it is impossible to fix a lower rate in Glens Falls or in what has been termed the Glens Falls-Fort Edward zone than on the rest of the system.

The Zones. Commissioner Cheney called attention to the undesirable features of the zone system in fixing fares on interurban roads, and it was intimated that the desirability of changing the rate base on this road from zone units to a mileage rate might be the subject of future consideration. The zones are not even approximately equal in length. They were formed to meet the local habits and needs of travelers. No complaint is now made as to their arrangement. It may, therefore, be assumed that they reasonably satisfy the requirements of patrons of the road. For the most part they overlap in such manner as to shade off the discrimination necessarily resulting in the case of those boarding or alighting from cars near zone limits, that is to say, those so placed traveling in one direction obtain an advantage which offsets the disadvantage to which they are subjected going in the other direction. With this arrangement not now under complaint it is deemed wise not to disturb it.

The writer does not believe that section 181 of the Railroad

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Law so operates as to require separate consideration in the case of each city or village upon the route. The traffic is practically entirely interurban except in Glens Falls and Saratoga Springs. As to the other cities and villages the road merely passes through them. Whatever local traffic there may be is very slight and it is carried on interurban cars. There is no urban system to permit of segregation. In the case of Saratoga Springs and Glens Falls it clearly appears that the statutory rate would be non-compensatory. We have in the evidence segregated the urban business in the Glens Falls-Fort Edward zone. This shows an operating income in 1919 under a 6 cent fare of \$379.64. The urban business in Saratoga Springs is not segregated, but the operating income for the Ballston Junction-Saratoga zone was in 1919 \$16,923.44. If the result of interurban operation were deducted we may properly infer from the Glens Falls-Fort Edward statistics and from uniform experience of the past three years in examining the affairs of street railroads operating in small cities that this income would be very small and would probably vanish entirely. If we should take Glens Falls and Saratoga Springs and conceive of them as presenting two separate urban systems and apply income accounts constructed on that theory to a valuation of the properties used in each community, the result would inevitably be a higher rate than the company now asks.

The application should be granted.

Chairman Hill concurs; Commissioner Barhite concurs, with opinion; Commissioner Kellogg dissents in part, with opinion; Commissioner Van Namee concurs with Commissioner Kellogg, with memorandum.

BARHITE, *Commissioner*, concurring:

This is an application by the Hudson Valley Railway Company for an order permitting it to increase its fare from 6 to 7 cents in the several zones established on its lines. In November, 1918, this Commission, after hearing, made its

order permitting an increase in fare from 5 to 6 cents in each of said zones. Commissioner Irvine who heard this case has reported in favor of granting the new increase. Commissioner Kellogg, while agreeing with Commissioner Irvine upon the various matters under discussion, raises the point that under section 181 of the Railroad Law the fare within the limits of any incorporated city or village through which the road passes, can not be raised above 5 cents without a separate consideration of each municipality and proof that the investment, income, and cost of operation and other legitimate expenses within the limits of such municipality justifies an increase in fare. The Commissioner further calls attention to section 29 of the Public Service Commissions Law which provides that at any hearing involving a rate increase, the burden is upon the carrier to produce the evidence to show that the proposed increase is just and reasonable, and the claim is made that under the two provisions of law to which attention is directed, the Commission has no power to increase the statutory rate within the limits of the cities and villages through which the road passes, as it must be admitted there is not sufficient evidence in the case from which the investment in these different cities and villages can be determined.

When two such able and distinguished lawyers as Commissioners Irvine and Kellogg, each seeking diligently to arrive at a just conclusion, differ as to the correct interpretation of the law, it is no easy or welcome task to attempt to cast one's lot with either side, but a careful study of the question under review leads to the belief that there is no legal reason why, under the evidence in the case, the prayer of the petition should not be granted. The two sections of the law quoted are simply parts of general and remedial statutes of a public nature. These statutes are designed for the purpose of adjusting as between a street railroad corporation and the public the rates of fare which may properly be collected, and as such are entitled to be

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liberally construed with a view to the beneficial ends proposed. (*Hudler v. Golden*, 36 N. Y. 446.)

An examination of section 29 of the Public Service Commissions Law shows no necessary obligation on the part of the carrier to prove the value of any certain portion of its property. It is simply provided that the burden of proof is upon the carrier to show that the proposed increase in rate is "just and reasonable". There are circumstances which may be very properly taken into account in rate making to determine whether a rate is "just and reasonable" other than the value of certain property. This fact is illustrated by the words of section 49 of the Public Service Commissions Law which indicate the matters which must be considered in fixing the rate for a common carrier. That section provides that "the Commission shall, with due regard *among other things* to a reasonable average return upon the value of the property actually used in the public service", etc. The Commission is simply directed to consider the value of the property employed for the public use when the rate of return, or to use a common expression, the amount of dividend, is under consideration. The expense of operating, of fixed charges, of money needed for contingencies, etc., are determined from matters other than the value of the property. It follows in this case that the value of the property used by the company in its business is of little moment because it is conceded that the rate named by the company will not yield sufficient revenue to pay a reasonable average return upon the property used in the public service. While undoubtedly the company is as much entitled to sufficient income to pay a return upon its investment as it is to an amount large enough to pay its expenses of operation, it has only asked for a certain rate and can not complain if no more than the amount named by it is granted.

If we consider section 181 of the Railroad Law, it is true that the section provides definitely that only a 5 cent fare shall be charged within the limits of any incorporated city

or village, but that particular statute must be interpreted under the principles laid down in *Riggs v. Palmer*, 115 N. Y. 506, that a thing which is within the letter of a statute is not within the statute unless it is within the intention of the law makers. In the case cited the question arose whether a beneficiary named in a will can receive the property given to him if it appears that he caused the death of the testator for the purpose of receiving the inheritance. The Court of Appeals laid down the law as quoted above and said no, although the statutes governing the transfer of property by will are explicit and make absolutely no provision for an exception under the circumstances noted in the case to which reference is made.

But the law making power has expressed its intention with regard to making rates, and in the very section providing for a 5 cent rate in cities and villages, has reserved the right to regulate fares and has given to the Public Service Commission the same power to be exercised as prescribed in the Public Service Commissions Law, and we have called attention to the manner in which that power is to be exercised, and the considerations which are to control.

If it be said that the urban business and property of the company if separately examined might show a sufficient income to warrant the payment not only of operating expenses but of a reasonable return upon the investment in the various cities and villages, the answer is that the record in the case when the fare was increased from 5 to 6 cents in each zone was introduced in this proceeding, and that evidence, with the other evidence in this particular proceeding, and the deductions which may properly be drawn therefrom show that the urban business of the company is conducted at a loss, and the question of a proper return upon the lines within the cities and villages is not involved.

Commissioner Cheney, in case No. 6085, has clearly stated the situation with regard to the urban business of the company, and it is not necessary to reiterate what he has said.

In my opinion the prayer of the petition should be granted.

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KELLOGG, *Commissioner*, dissenting in part:

This applicant, almost since its organization, has had a continuous history of adversity. It has paid no dividends upon its stock, it has paid no interest upon its non-cumulative income debentures, and in order to meet and to pay interest charges on its bonds, the outstanding issue of which is \$2,304,000, it has been compelled to borrow since its organization principally if not entirely from its owners who alone are willing to make the advances.

It has no history of prosperity in other days, which requires it to meet without complaint the unfavorable conditions which it now encounters.

By order of this Commission in case No. 6085, decided November 19, 1918, Vol. VII, Public Service Commission Reports, Second District of New York, page 287, this company for the reasons stated in the Opinion therein by Commissioner Cheney was permitted to increase its passenger fares from 5 to 6 cents in each of its zones. It now applies to make a further increase from 6 to 7 cents.

Elaborate and carefully prepared tables have been submitted in behalf of the petitioner, in support of its petition.

The petitioner leases from The Delaware and Hudson Company which owns the stock of the United Traction Company which in turn owns the stock of this petitioner, a steam power plant at Mechanicville, for which it pays an annual rental of \$51,000. The power generated at this point in excess of that needed for the uses of the petitioner is sold to various other companies.

The operations of this plant had in years prior to 1919 been profitable, but for that year show a loss of \$15,180.97. The power used by this petitioner was charged to it on a sliding scale of rates, provided for by tariffs duly filed, the average cost during the year 1919 being about 1.4 cents per kw.h. This is somewhat less than their average charge to others for the electricity sold and used from the plant, and upon this basis which seems not to be unreasonable the company

failed by the above amount of \$15,180.97 to meet the payment of annual rental charge of the Mechanicville power station to The Delaware and Hudson Company.

Under these conditions the cost of maintenance of this plant, due to payments by this company to the ultimate owner, in excess of the fair cost of the electricity furnished at the schedule rates, is not a proper deduction to be made in determining the income of the petitioner from railroad operations.

Other criticisms have been made as to the propriety of certain expenditures. The intimate relations between this company, its immediate owner the United Traction Company, and its ultimate owner The Delaware and Hudson Company gives rise to widely spread suspicion, and the need for careful consideration of the fairness of all transactions between them.

These matters have been carefully considered by Commissioner Irvine in his Opinion, and his conclusion that there is no ground for serious criticism as to any of them is amply sustained by the evidence.

An examination and analysis of the exhibits of the results of operation lead to the conclusion that the affairs of the petitioner have been managed in a reasonably economical manner, and that no substantial change can be suggested in further reduction of operating expenses as claimed upon the theory that any of them are unwarranted.

The operations of the petitioner for the year 1919 were conducted under the 6 cent fare increase.

The company's income was	\$145,405.42
of which	3,381.17
was the income from securities, leaving	\$142,044.25
income from its railroad operations.	
This included, however, the loss at the Mechanicville power house, above stated of	\$15,180.97
indicating an income from railway operations of	\$157,225.22
less rental of leased lines, Saratoga terminal, and a rotary station, aggregating	25,987.53
which deduction leaves	\$131,237.69
for return on the investment.	

The passenger receipts for the year ended December 31, 1919, at the 6 cent rate, were \$773,036.08. An increase

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to 7 cents would theoretically increase the passenger revenue \$128,865.11.

The experience of this company at the time of the previous increase shows that there was no falling off in traffic due to the increase in fare. It is reasonable to suppose this experience will be repeated. Adding this theoretical increase from a 7 cent fare to the actual receipts on the 6 cent basis would give a probable income of \$260,102.80. This income would yield only a return on an eight per cent basis on an investment of about \$3,250,000.

There has been no proof of value of the property, but taking the value of other trolley lines, as found by appraisals and examinations of this Commission, for comparison it would seem that the capital invested in the road and equipment must be at least this amount. There can not be found in the record sufficient basis for a finding that the investment must be at least five million, as indicated in the previous proceeding.

No direct evidence as to property value has been given. However, we may consider in this connection the actual valuation of roads similarly situated. Such valuations on other lines, some of which have been approved by the Commission for rate purposes, are as follows:

Name of corporation	Investment, road and equipment	Miles of track owned	Average investment per mile of track owned
Elmira Water, Light and Railroad.....	\$1,949,225.03	43.875	\$44,426.78
Western New York and Pennsylvania Traction.	4,144,932.97	95.287	43,499.46
Albany Southern.....	3,189,371.46	59.91	53,236.05
Southern New York Power and Railway Corp.	2,180,268.46	68.16	31,987.51
Westchester Street.....	1,023,871.86	22.757	44,991.51
Ithaca Traction.....	1,006,109.93	11.62	86,584.33
Orange County Traction.....	1,227,774.58	21.076	58,254.63
Elmira, Corning and Waverly.....	1,494,670.74	28.729	52,026.55

The smallest of these valuations is that of the Southern New York Power and Railway Corporation, where the valuation was \$31,987.51 per mile of track. The entire mileage of track owned by this petitioner is 126.14.

If the value of road and equipment of the petitioner is equal to that of the Southern New York Power and Railway Corporation per mile of track, and the condition of its road as is shown in this record and its location amply warrant the conclusion that it is at least that, the multiple of the value per mile by total mileage of track would result in indicating a valuation of \$4,034,904.51 or in round figures four million dollars.

Perhaps this method of estimating a valuation by making a comparison with values of roads which in general are similarly situated would not meet the requirements of strict rules of evidence in a Court of law, but the statute under which we derive our powers expressly states that "this Commission shall not be bound by technical rules of evidence". (Public Service Commissions Law, section 20.)

In cases of this nature, resort has been frequently had to this method whereby a minimum valuation may be established upon which this Commission may act, and thus avoid the tedious and expensive process of requiring evidence of the actual physical value of an extended utility property.

But the burden of proof being upon the petitioner to present all the elements necessary to justify an increase of rates, the justice of which is challenged, the Commission should not go beyond such demonstrated minimum in the absence of more explicit evidence of value as a rate base.

Upon the basis of a valuation of \$4,000,000, an income of \$260,000 would yield a $6\frac{1}{2}$ per cent return, and even allowing all possible deductions for various alleged unnecessary and improvident expenditures, it would fall far short of eight per cent which under present conditions would not be an excessive return.

I am in favor, therefore, of increasing the fare to 7 cents in each of the zones of the petitioner, subject, however, to an important modification now to be suggested.

Section 181 of the Railroad Law makes provision that no corporation such as this shall charge any passenger more

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than 5 cents for one continuous ride from any point on its road to any other point thereon within the limits of any incorporated city or village.

By the same section, however, the Public Service Commission is given power to regulate the rate of fare. This express provision of law has full force and effect in each incorporated city and village on the line of this petitioner. They are all of them entitled to be separately considered, and no increase in the rate of fare of any of them can properly be made unless the investment and operation in that particular locality require it. Fares should not be increased in Waterford because operations in Lake George over fifty miles away are unprofitable.

Section 29 of the Public Service Commissions Law provides, as has already been intimated, "At any hearing involving a rate increased after the first day of January, nineteen hundred and fourteen, or of a rate sought to be increased after this section as amended takes effect, the burden of proof to show that the increase in rate or proposed increase in rate is just and reasonable shall be upon the common carrier."

Therefore, with the fare limitation prescribed by section 181 of the Railroad Law in incorporated villages and cities, and the burden of proof imposed on the railroad company to establish the propriety of an increase of rates, it is essential that evidence be given as to each particular city and village in that regard. It follows that unless such evidence be given, and the burden of proof in that respect be met by the petitioner, such increase can not properly be made.

In this case there is no evidence as to the operating income, or expenses in connection therewith, or the investment in the property as to any municipality under the protection of section 181. Proof of operating expenses has been given by zones to some extent, and operating expenses allocated by car-miles have been computed as to certain zones, including the Glens Falls-Fort Edward zone and the Saratoga zone, but none of these zones are confined to any municipality so far as

the evidence discloses. Some of these zones are of substantial length. One extending from Parry street in Hudson Falls to Bank Square in Glens Falls is 4.68 miles long, in addition to which distance passengers are entitled to be carried for the single fare to any portion of the latter city. These long hauls, when expenses are figured on a car-mile basis, of course, absorbed much of the revenue derived therefrom.

When, however, it is borne in mind that passengers who travel solely within the confines of the city probably do not traverse on their journey more than two miles, and frequently not more than one, it becomes readily apparent that any transportation of such passengers, computing the cost on a car-mile basis, would yield a substantial revenue over expense.

The so called urban traffic referred to as such in the Opinion of Commissioner Irvine, and denominated in the exhibits of the applicant, in reference to the Glens Falls-Fort Edward zone, is not urban traffic at all. It is a transportation not only in those municipalities but between them, and the small amount of operating income from such operations referred to in his Opinion as \$379.64 is the result of operations not only in the city of Glens Falls or in either of the villages of Hudson Falls or Fort Edward, but is a result of this transportation between the villages as well.

This small income results from the fact that against the receipts of its operations are charged on a car-mile basis a proportion of the expenses which for a zone 4.68 miles long are proportionately heavy.

There is nothing in this evidence or statement which indicates that the present fares charged in the city of Glens Falls, or either of the other municipalities, for strictly local passengers, are not profitable. The evidence indicates very strongly the contrary, especially when the short distance traversed by such passengers is borne in mind, and compared with the long distances traveled by the inter-community passengers. The local city passengers are carrying the burden of those transported beyond the confines of the city

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through two intermediate towns and arriving at some point in the neighboring village.

This condition is taken only as a type, and may be the situation in all the other municipalities. At least there is no evidence to the contrary. There is no proof that the cost of operation, taken in connection with the return on the capital invested, warrants an increase in the charge for transportation of passengers within the limits of any city or incorporated village.

The indications are that the carrying of local passengers who ride only a short distance within incorporated villages and cities is not unprofitable at the present rates. Each of such municipalities must stand upon its own merits, and in order to authorize an increase in fare in any one of them, the conditions there must be shown to justify such action: this has not been done.

The evidence of the general situation warrants an increase of fares in zones so far as they connect different municipalities or lie outside of incorporated villages and cities, the evidence being that traffic at various portions of the line in such localities is not substantially similar. But in municipalities coming within the protection of section 181 of the Railroad Law, there is no sufficient evidence to justify an increase of fare.

The increase in fare applied for should therefore be granted except as to passengers carried locally between points within any city or incorporated village, in which the fare should remain as at present.

Memorandum by Commissioner VAN NAMEE, concurring with Commissioner Kellogg:

Section 181 of the Railroad Law provides that no corporation constructing and operating a railroad under the provisions of this article shall charge any passenger more than 5 cents for one continuous ride from any point on its route

to any other point thereon within the limits of any incorporated city or village.

The Public Service Commission, however, has by the same section power to regulate this rate of fare and this regulation shall be based upon a study of the revenues and operating expenses of the railroad in question within any such city or village. In this case the company has produced figures showing the income for the Glens Falls-Fort Edward zone, but has produced no figures to show the cost of operation and revenue from operation within the city of Glens Falls itself, of passengers who travel from one point in the city to another.

This increase in fare affects all classes of passengers, whether they travel from one point in the city to another point, or from outside the city to a point in the city or *vice versa*.

I believe before being allowed an increase of fare inside the city on passengers from point to point within the city the company should produce figures showing the necessity for such increase because of the cost of operation in carrying such passengers.

I therefore concur with the dissenting opinion of Judge Kellogg.

No. 514 : 365

Petition of ALEXANDRIA BAY-REDWOOD TRANSPORTATION COMPANY, INC., under chapter 667, laws of 1915, for a certificate of public convenience and necessity for the operation of a stage route by auto buses in the city of Watertown, it being proposed that the route shall also be operated between Watertown and the incorporated village of Alexandria Bay, Jefferson county. [Case No. 7587.]

In granting certificates of convenience and necessity the Commission should take into consideration the competition involved and the condition of existing bus lines and transportation companies outside the city on the same route or closely paralleling the route proposed.

It is not in the interest of the public to allow such competition as will result in the bankruptcy of the persons engaged in it, for the ultimate result is that the public will not receive any permanent service whatever.

Certificate granted to company paralleling in part the route of an already existing company.

Decided July 8, 1920.

Appearances:

George S. McCartin, Watertown, attorney for petitioner.

Thomas Burns (by Edward W. Carroll), Watertown, attorney for House & Vrooman.

Francis McKinley, Clayton, attorney for Fred I. Dailey, in opposition.

VAN NAMEE, Commissioner:

The Alexandria Bay-Redwood Transportation Company, Inc., was originally organized in 1916. There were about sixty stockholders, mostly residents of the village of Alexandria Bay. The company operated and still continues to operate a bus line between the villages of Alexandria Bay and Redwood in the county of Jefferson, a distance of about 6 miles.

The company is now in process of reorganization and desires to operate also between the village of Alexandria Bay and the city of Watertown passing through Fishers Landing, Omar, LaFargeville, Stone Mills, and Gunns Corners. The proposed part of this operation for which a certificate from this Commission is requested is that part of the route which lies within the boundaries of the city of Watertown.

It is necessary under the statute for the company to procure a consent from the City of Watertown for the operation over certain streets in such city and a certificate of public convenience and necessity from this Commission. No town board of any town nor the board of trustees of any village through which the proposed line is to pass has brought itself within the provisions of section 26 of the Transportation Corporations Law, and therefore their consent for this operation is not required. The consent of the City of Watertown has been granted under a resolution adopted by the common council of the city on May 3, 1920.

There are at the present time two auto routes operating between Watertown and Alexandria Bay, one operated under a certificate granted by this Commission to House and Gaffney, which operates from Watertown through Pamela and Theresa to Alexandria: this route is 9 miles farther than the proposed route, and does not operate on the same road at any point. The other line is operated by Mr. Dailey and runs from Watertown to Gunns Corners through Depauville to Clayton, thence paralleling the St. Lawrence river through Fishers Landing to Alexandria Bay.

The proposed route will run on the same road as the Dailey route from Watertown to Gunns Corners, a distance of 9 miles, and from Fishers Landing to Alexandria Bay, a distance of 6 miles. The total mileage of the proposed route from Watertown to Alexandria Bay is 30 miles.

The only railway transportation line of any character touching any of the villages through this route is the

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New York Central line which runs through the village of LaFargeville. The distance by rail from LaFargeville to Watertown is 48 miles and by bus is 17 miles. The passenger train service is infrequent.

The officials of the New York Central were notified of this hearing, but did not appear, nor was any objection to the granting of this certificate entered by them.

Alexandria Bay is a village of about two thousand inhabitants, and is the principal point in the Thousand Island region below Clayton. It is not on the line of any railroad, the nearest being at Redwood a distance of 6 miles. Travel between the village and the city of Watertown is large, especially during the summer season.

The proposed route after leaving Fishers Landing passes through Omar which is a small hamlet, thence southward through LaFargeville, a settlement of about one thousand people and one of the centers of the hay trade in Jefferson county, thence continuing southerly through Stone Mills, another small hamlet to Gunns Corners. After leaving Fishers Landing and until Gunns Corners is reached, a distance of 15 miles, this route passes through a section not already served by any automobile bus route, the inhabitants of which at present, except those at LaFargeville, have to travel several miles before reaching the line of any established system of transportation.

Evidence was given at the hearing that the operation of both the present lines between Alexandria Bay and Watertown is profitable though no figures were produced. With the amount of new territory to be opened by this proposed line it would seem that its operation might also be profitable without seriously interfering with the revenues of the lines already established. It is true that the proposed line parallels the Dailey route from Gunns Corners to the city of Watertown, but most of the passengers on either line will undoubtedly travel the entire distance from Clayton or Alexandria Bay as the case may be, and the travel from

Gunns Corners to the city of Watertown which will be affected is small. The same condition exists in the joint operation from Fishers Landing to Alexandria Bay.

It may be inferred that the city by granting its consent to the operation over certain streets on which other lines already operate is satisfied that congestion will not result and that such operation is beneficial to the city.

While the petition to the city only made application for a franchise for its passenger motor buses to enter the city of Watertown, and in another paragraph specified the route which the company proposed to operate between Watertown and Alexandria Bay, the consent of the city gave permission for the company to operate over the route proposed in such petition. It must be taken that such consent on the part of the city was given only for the operation of such buses over the streets in the city necessary to reach its terminus from the city limits, and did not attempt to designate the route to be followed beyond the city boundaries. The Commission, however, in several cases decided subsequent to the amendment made by chapter 667 of the laws of 1915 to section 25 of the Transportation Corporations Law has held that in granting these certificates of convenience and necessity the Commission should take into consideration the competition involved and the condition of existing bus lines and other transportation facilities outside the limits of a city on the same route or closely paralleling the route proposed, to the end that persons or companies operating over existing routes should receive a fair measure of protection, and that ruinous competition should not be allowed. It is not in the interest of the public to allow such competition as will result in the bankruptcy of the persons engaged in it, for the ultimate result is that the public will not receive any permanent service whatever. (*Matter of the Petition of Buschini*, Vol. 7 P. S. C., 2nd Dist., 299; *Matter of Petition of Blevins*, P. S. C., 2nd Dist., Opinion No. 427, decided July 24, 1919; *Matter of Van Hoesen*, P. S. C., 2nd Dist.,

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Opinion No. 434, decided August 26, 1919; *Matter of Petition of Licewicz*, P. S. C., 2nd Dist., Opinion No. 480, decided March 9, 1920.)

In this case, after a careful study of the evidence, together with personal knowledge of the conditions of the section and the routes operated and proposed to be operated, by the sitting Commissioner, and after due consideration it appears that public convenience and necessity will be met by the petitioner being allowed to operate its proposed line in this territory, a large part of which is not reached by any transportation line, either railroad or automobile.

Nothing is said in the consent given by the city relating to the receiving or discharging of city passengers within the city limits, but it is assumed that this line does not propose to compete with the local traction company.

The certificate will, therefore, issue under the terms of the consent granted by the city for a period of five years, and the usual conditions imposed by this Commission and specifically excluding the carriage of passengers from any point in the city of Watertown to any other point in said city.

An order has been entered accordingly.

Chairman Hill and Commissioners Irvine, Barhite, and Kellogg concur.

In the Matter of the Complaint of the TRUSTEES OF THE VILLAGE OF HORSEHEADS, Chemung county, under sections 71 and 72, Public Service Commissions Law, *against* ELMIRA WATER, LIGHT AND RAILROAD COMPANY as to prices charged for electric street lighting. [Case No. 7485.]

Where an electric lighting company has made a contract with a municipality to furnish street lighting, the electric lighting company has no power to increase the rate fixed on the contract by filing a tariff.

In such a case this Commission has no jurisdiction to fix the rate. The contract between the parties is binding.

Decided July 15, 1920.

Appearances:

Frank S. Bentley, Corporation Counsel, Horseheads, and *Jess S. Kellogg*, President, Village of Horseheads, for the complainant.

Beekman, Menken & Griscom (by M. G. Bogue), 52 William street, New York city, for the respondent.

KELLOGG, Commissioner:

Under date of March 1, 1920, the respondent, the Elmira Water, Light and Railroad Company, issued a tariff effective April 1, 1920, providing rates for electric lighting in streets of villages, towns, and communities having a demand of at least ten lights, and not over one hundred fifty lights. This included among other municipalities the Village of Horseheads.

In this proceeding that village complains of the tariff filed, and requests that the rates be disallowed. The complaint is based upon two grounds, one of which is that the rates are excessive and constitute an unjust exaction, and are preferential.

A further objection to the rates in question is made by the complainant, based upon the existence of an outstanding contract between it and the respondent, providing for the furnishing of electric street lighting service at the lower rate, which it claims is binding upon the respondent.

The contract in question was in writing, duly executed by the parties, and became effective for a period of five years from December 1, 1914. The village, by its terms, was given the right at its election to renew the contract for a further term of five years, which right of election it has duly exercised, and the question now is presented as to whether the contract can be altered by the filing of a tariff fixing a higher rate, and if so whether this Commission has jurisdiction to pass upon the validity of the tariff and the unreasonableness of the rates.

Although the complainant demands relief from this Commission and the respondent asserts that an order should be made sustaining the tariff, unless it is shown to be unreasonable, excessive, or discriminatory, a question of jurisdiction, although not raised directly by either party, confronts us at the outset.

The jurisdiction conferred upon this Commission in reference to gas and electrical corporations is carefully defined by section 66 of the Public Service Commissions Law. In the first instance charges to be made by an electrical corporation for lighting service are fixed by filing of tariffs. Subdivision 12 of the section provides that no different charge shall be demanded, directed, or received than that specified in the tariff.

Provision is made elsewhere in the article for investigation by this Commission, upon its own motion, or upon complaint as to the unreasonableness of charges made by the companies, pursuant to tariffs filed, and this Commission is given power to change or to make orders fixing such prices.

The filing of a tariff is a condition precedent to charging any rate. The subdivision in question contains, however, this express exception: "but this subdivision shall not apply to state, municipal or federal contracts."

A narrow construction of this limitation is urged by this respondent, to the effect that this merely does away with the necessity of filing state, municipal, or federal contracts with this Commission. This interpretation of the restric-

tion, however, would render it practically meaningless. The object of the enactment was evidently to except from the machinery in reference to fixing rates, and our consequent jurisdiction, all contracts made by state, municipal, or federal authorities with electric lighting companies.

Numerous cases are cited by the respondent under other statutes not containing this limitation, but such cases are not authorities as to the proper interpretation of this limiting provision. How far the contract is binding under the law is a matter for the courts and not for us.

Decisions and utterances of our court of last resort indicate that it might be held that such contracts are binding even beyond the power of the Legislature to abrogate, where such power is not reserved. (*Kings County Lighting Co. v. City of New York*, 176 App. Div. 175, affd. 221 N. Y. 500; *Peo. ex rel. Vil. of S. Glens Falls v. P. S. Comm.* 225 N. Y. 216, 221.)

However that may be, the tariff filed, whereby the contract is sought to be abrogated, has no effective force under the Public Service Commissions Law, and this Commission has no jurisdiction to enforce its provisions, or to determine the reasonableness of its rates, or to make an order fixing a rate.

An order should therefore be entered holding that the tariff filed has no effective force as to rates to be charged for municipal street lighting in the village of Horseheads, or any other municipality having an existing contract with the respondent.

Chairman Hill and Commissioners Irvine and Van Namee concur; Commissioner Barhite dissents, with Opinion.

BARHITE, *Commissioner*, dissenting:

This proceeding is brought by the Trustees of the Village of Horseheads, and is based upon an objection to the allowance of proposed new tariffs and charges for supplying electric lights to the streets of the village of Horseheads, as

contained in a schedule filed with this Commission by the defendant company. The ground of the objection is that such tariffs and rates are excessive and constitute an unjust and unreasonable exaction, and are preferential.

A further ground of objection to the tariffs is made in the complaint upon the ground that on or about the first day of December, 1914, a contract was made and entered into between the defendant company and the Village of Horseheads, whereby the rates to be charged and paid for street lighting were fixed and determined for a period of five years, and that in and by said agreement it was further provided that the village had the right to renew said agreement for a further term of five years, that said agreement had been renewed by the village, and that by said renewal the company is only entitled to charge rates for street lighting provided in said agreement.

The sitting Commissioner, in an ably written opinion, has found that the tariff filed, whereby the contract is sought to be abrogated, has no effective force under the Public Service Commissions Law, and that this Commission has no jurisdiction to enforce its provisions or to determine the reasonableness of the rates contained in said tariffs, or to make an order fixing a rate.

I most heartily concur in the proposition that the company has no power, by filing a tariff or otherwise, to abrogate the provisions of the legal contract made by itself and the Village of Horseheads in which the rates for public street lighting are named and fixed; in other words, that the contract in question is valid as between the parties to it. This proposition has several times been enunciated and must be considered as the law of the land. (*Columbus Railway Power and Light Company v. The City of Columbus*, 249 U. S. 399.)

But with the proposition that this Commission has no jurisdiction to determine a fair and proper rate which the defendant company may charge the Village of Horseheads,

in spite of a contract between the two parties, I can not concur. It is true the rates to be charged by gas or electrical corporations are usually fixed by tariffs which are filed with this Commission and which become effective after a certain period and are the legal tariffs of the company unless changed by order of this Commission. Subdivision 12, section 66 of the Public Service Commissions Law provides for the filing of these tariffs, and gives the Commission power to require every gas corporation, electrical corporation, and municipality to file with the Commission and to print and keep open to the public inspection the schedules showing all rates and charges. It is true that this subdivision contains this language, "but this subdivision shall not apply to state, municipal or federal contracts". In other words, the Legislature has provided that, while the Commission may require the ordinary rates and schedules made by a company to be filed with it, it can not require a contract made by the public authorities named to be filed. It is unnecessary to inquire why this distinction is made. It has been made by the Legislature. But in this subdivision not a single word is said as to the power of the Commission to fix rates, and no reference is made to the circumstances under which the Commission has the power to determine what the rates of any company shall be. And there is nothing in this subdivision from which it can be inferred that it was the intention of the Legislature not to give the Commission any power over rates fixed by contracts between a company and a municipality. Subdivision 5 of section 66, and sections 71 and 72 of the Public Service Commissions Law are the source from which the Commission derives its powers to determine rates. Subdivision 5 of section 66 provides "Whenever the Commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such person, corporation or municipality are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of any pro-

vision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished. . . ." etc.

It will be noticed that the Trustees of the Village of Horseheads in their complaint make the charge that the tariffs and rates proposed by the company are excessive and constitute an unjust and unreasonable exaction, and are preferential. Under the subdivision quoted this Commission has power either upon its own motion or upon complaint to investigate the claim that the proposed rates are unjust, or are preferential.

Sections 71 and 72 provide for the manner in which complaint as to rates may be brought before the Commission, and provide for a hearing before the Commission, and provide that after the hearing the Commission may fix the maximum price of gas or electricity, and further provide that in determining the price to be charged for gas and electricity the Commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard, among other things, to a reasonable average return upon the capital actually expended and to the necessity of making reservations out of income for surplus and contingencies. Nowhere is there information in the statute that the Commission shall not have jurisdiction to determine the question brought before it in the case at bar.

It must be remembered that the question as to whether one of the parties to a contract fixing rates can change the rates of his or its own volition, is an entirely different question from the one as to whether the state, under its police powers, can ignore the terms of that contract and do justice as between the parties, irrespective of the private agreement. This distinction has been clearly recognized by the courts. (See *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372; *Southern Public Utilities Co. v.*

City of Charlotte, 101 S. E. 619.) In *Chicago Railways Co. v. City of Chicago*, 126 N. E. 589, decided as late as February 18, 1920, the Supreme Court of Illinois says: "It may be true that the constitutional and statutory provisions imply authority of a municipality to make an agreement with a public utility as to rates binding on the parties to the contract so that neither one can repudiate the contract with the other and it can only be abrogated by them by mutual consent, but that is a very different proposition from authority to deprive the state of its rights to regulate fares and lower them if found to be excessive and more than reasonable compensation for the service performed, or to raise them if so low as not to be fair, just and reasonable to the public utility."

It may be said in passing that if the contract between the Village of Horseheads and the defendant company disables the company from performing the functions it is its duty to perform, then the contract between the company and the village is a violation of the contract with the State and is void as against public policy. (*Thomas v. West Jersey R. R. Co.*, 101 U. S. 71.)

The question before this Commission is not whether the contract between the company and the Village of Horseheads is legal. The simple question is whether the Commission as a representative of the State authority can ignore the terms of that contract under the police power of the State, and do what is just and right between the parties.

Neither the *Kings County Lighting Co.* case, 176 App. Div. 175, affirmed 221 N. Y. 500, nor *People ex rel. Village of South Glens Falls v. P. S. Commission*, 225 N. Y. 216, can be quoted as authority against the position noted above. In the *Kings County Lighting Co.* case the court simply held that the company was bound by the terms of a contract which had been made between itself and the city, and is right in line with the authority cited above in 249 U. S. 399. In the *South Glens Falls* case the court took occasion to say

that a contract between a company to furnish gas and the municipality itself might be considered as a contract the terms of which can not be abrogated except by the parties themselves. But what the court said in that case was simply obiter, was not necessary for the decision of the case, and can not be used as an authority; in fact the court simply said what might be the law, and not what is the law.

If the Public Service Commission has no power to investigate and determine the proper rates as between the defendant company and the Village of Horseheads, then the village and the company might make a contract which would give a special rate, rebate, or drawback, or an unreasonable preference or advantage to the village in violation of subdivisions 2 and 3 of section 65 of the Public Service Commissions Law, and the Commission would have no power to correct such illegal act; and yet, by subdivision 5 of section 66, the Commission is directly given authority when it shall be of opinion, after hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any person, corporation, or municipality are unjust, unreasonable, unjustly discriminatory, or unduly preferential, to correct the wrong done and determine what shall be the just and reasonable rates and charges. A gas corporation has no more power under the statute to make an undue preference in favor of a municipality than it has to make such preference in favor of a private customer. Subdivision 3 of section 65 of the Public Service Commissions Law to which we call attention especially, says, that "no gas corporation . . . shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality". The term "any corporation or locality" is certainly sufficiently broad to include a village.

The question might be considered at greater length and other decisions quoted, but it is unnecessary, and I must hold as has heretofore been indicated.

Petition of THE NEW YORK CENTRAL RAILROAD COMPANY under section 91, Railroad Law, for an order determining that the crossing at grade of a highway and its railroad (Ogdensburg branch, St. Lawrence division) about 1.06 miles north of Marcy station in the county of Oneida shall be closed and discontinued, and the travel diverted to an existing under-crossing over existing highways. [Case No. 5945.]

Decided July 20, 1920.

Appearances at the hearing in Utica June 21, 1918:

Kernan & Kernan (by Warnick J. Kernan), Utica, for petitioner.

T. O. Jones, Supervisor of the Town of Marcy.

E. F. Thomas, F. R. Simmons, D. E. George, Mrs. D. E. George, George T. Simmons, and B. J. Smith, property owners residing in the town of Marcy.

Appearances at the crossing July 10, 1918:

Kernan & Kernan (by Warnick J. Kernan), Utica, for the petitioner.

T. O. Jones, Supervisor of the Town of Marcy.

Jacob F. Wall, Town Commissioner of Highways.

VAN NAMEE, Commissioner:

At a point on the St. Lawrence division of the New York Central railroad about 1.06 miles north of Marcy station in the town of Marcy, Oneida county, the railroad which at this point is double track crosses at right angles a highway at grade. The highway is known as Baker's highway. About 1100 feet south of this grade crossing there is an under-crossing of the railroad known as Simmons Highway under-crossing. Both Baker's highway and Simmons highway are dirt roads maintained by the Town of Marcy. Parallel with the railroad, and for some distance beyond the point where

Baker's highway and Simmons highway intersect, there is a state highway which is one of the principal routes from Utica north to the village of Trenton.

At the present time the traveler proceeding along Baker's highway going west may, instead of crossing at the grade crossing on Baker's crossing, turn south on Simmons highway about 600 feet from the crossing, and proceeding along it about 900 feet, reach the state highway by the under-crossing, about 1200 feet southwest of the point where Baker's highway, after crossing the railroad at grade, intersects it.

On March 22, 1917, The New York Central Railroad Company filed a petition proposing that that portion of Baker's highway which is within the limits of the railroad right of way be closed and discontinued and that traffic be diverted from Baker's highway to Simmons highway which is carried underneath the railroad. Some correspondence was had with the company in relation to the matter, and an inspection of the crossing was made by the then engineer of grade crossings of the Commission. The crossing was also personally inspected by the then chairman of the Commission. Notice, as provided by law, was given to the public and to the property owners affected and to the officers of the Town of Marcy, in which the crossing is located, and a hearing was held before Commissioner Fennell at Utica on the 21st day of June, 1918, and an adjourned hearing was held at the crossing itself on July 10, 1918. At the hearings considerable opposition was evident from those residing in the vicinity.

It was claimed that the crossing itself was not dangerous; that there was no record of any accident or loss of life at the crossing; and that the rather stiff grade on Baker's highway in approaching the railroad crossing was offset by the muddy and swampy condition of Simmons under-pass highway, its impassable condition in Winter because of snow and drifts and the grade of 6 feet in 50 from the exit of the under-crossing to the state highway. Simmons highway enters the state highway after emerging from the tunnel at right angles

with a grade of 6 feet in the 50 covered, and it was claimed that it was impossible for horses to gain a foothold on the state highway sufficient to pull heavy loads from the dirt road on such a grade.

At the hearing in Utica a petition of protest was filed by the town board of the Town of Marcy, and a protest against the elimination of the Baker's Highway grade crossing by 53 residents of the town of Marcy within the vicinity of the crossing.

This crossing is relatively an unimportant one, the record of travel for June 13, 14, and 15, 1918, introduced at the hearing shows a total of eight passenger trains and two freight trains a day in either direction, and the travel on the road during those days to have been an average of four pedestrians, ten vehicles, and two automobiles.

No decision was arrived at, and the case was assigned to me shortly after my appointment to the Commission. I have made a personal inspection of the crossing, and after careful study of the exhibits and a reading of the evidence, I am of the opinion that the proposed change would result in as dangerous a condition for the traveling public as now exists by reason of the grade crossing, and that public safety does not require the closing of this crossing and the diversion of the travel thereon to Simmons highway as proposed. There being so little travel on this road, and the gain to the public in the matter of safety not being sufficiently apparent, and having in view the very decided protest of the town board of the town and of practically all the residents in the vicinity of the crossing, in my opinion the application should be denied. An order has been entered accordingly.

All concur.

In the Matter of the Complaint of the TRUSTEES OF THE VILLAGE OF WARSAW, Wyoming county, *against* WARSAW GAS AND ELECTRIC COMPANY as to prices proposed to be charged the public for electricity, and as to installation charges for electricity. Also complaint of the company, in its answer, asking that its present rates for electricity be sustained. [Case No. 6585.]

1. An electric light company should not make a difference in price for its product based solely upon the use to which that product is put by the customer.

2. When a public service corporation ignores its schedule rate and charges a customer according to the terms of a private contract the amount which would have been produced by the schedule rate should be charged against the company in determining its true income.

Decided March 9, 1920.

Appearances:

Hon. James E. Norton, attorney for complainants; *Hon. Martin S. Decker*, for respondent.

BARHITE, Commissioner:

The Warsaw Gas and Electric Company has put into effect increased rates for electricity pursuant to schedules filed with this Commission. The Trustees of the Village of Warsaw filed their complaint, alleging that the new rates are unjust, unlawful, and discriminatory. Upon examination of the schedules with reference to the last ground of objection it is found that the provisions which pertain to the lighting rates available to all residence consumers are the same as those applicable to all business consumers except that the price per kw.h. for metered current is 2 cents higher for residences than for business places using the same amount of electricity. It is claimed that this difference in price is discrimination between the two classes of customers.

The vice-president of the company when asked the reason for the difference in rates said that it was largely a matter of custom. The statute provides that "No . . . electrical corporation . . . shall . . . subject . . . any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever". Unless unusual circumstances exist, there is no reason why a customer should pay more for a certain amount of electricity to light his home than for the same amount to light his store. The two different kinds of lighting are used at practically the same hours, especially in the smaller cities and villages, and it costs the company no more to furnish the one than the other.

The schedule of rates provides that the maximum rate of 15 cents per kw.h. shall be charged all domestic consumers using not more than 50 kw.h. per month. Thereafter the price drops 1 cent for the next 50 kw.h. and 1 cent additional for each 100 kw.h. up to 300, that amount and all over that amount being at the rate of 11 cents per kw.h. The rate for business places starts at 11 cents and drops 1 cent at a time for the same amount described in the plan for domestic consumers. In either class the minimum charge is \$1 per month, with a discount of 5 per cent if the bill is paid before a certain date. An examination of the ledgers of the company for three months in the year 1918 of all consumers between letters A to L including approximately 50 per cent of the customers shows that out of 341 domestic consumers 339 or 99.4 per cent use not to exceed 50 kw.h. per month. Out of 170 business consumers 118 or 63.3 per cent do not exceed the same amount. In fact, a large number of business concerns use less energy than a number of domestic consumers. Of the business consumers 22 do not use to exceed 75 kw.h. per month; 12 do not exceed 100 kw.h.; and 8 do not exceed 150 kw.h.; 6 do not exceed 200 kw.h.; 3 do not exceed 300 kw.h.; and only 1 exceeds 400 kw.h.

There is nothing in this record which warrants a sliding scale upon the basis named in the schedules. In fact, when we consider that 99.4 per cent of the domestic consumers and 63.8 per cent of the business consumers pay the highest rate, the sliding scale is of but little practical significance, and it can not be said that the domestic consumer is not subjected to an undue disadvantage.

In *Baily v. Fayette County Fuel Co.*, 193 Pa. 175, it is held that a company has no power to make a difference in price according to the use to which gas is put by the consumer and can not impose a discrimination in price of its product based solely on the value of the same to the consumer.

The Warsaw Elevator Company is the largest consumer of electric energy in the village of Warsaw. According to information furnished the Commission by the Warsaw Gas and Electric Company, the amount was furnished under a contract made in 1916. On account of a dispute between the two companies as to whether the contract had been terminated, electricity was furnished under the contract rate until November 1, 1919. The contract rate was less than the schedule rate. For the eleven months ended November 30, 1918, the amount collected was \$3331. At the schedule rates which prevailed for the same period the amount would have been \$5043.50, a loss to the company of \$1712.50. During the year ended September 30, 1919, the amount collected from the elevator company was \$3681.50; at the schedule rates the amount would have been \$6362, or a loss of \$2680.50. Undoubtedly, in this transaction, the electric company followed what is considered to be good business policy and had no thought of violating the law. Whatever the Commission might be willing to do as a matter of discretion, it has no discretion, and must insist that the terms of the statute be followed. If public utility companies can make a private contract and then charge for their product according to the rates named in the contract,

great injustice might result. For example, a company might make a contract with a favored customer and then file a schedule for increased rates and thus do great injury to other less favored consumers. That in this case the electric company might have charged the elevator company schedule rates if those rates were fair and just, in spite of the private contract, is well established by the courts. See *Union Dry Goods Company v. Georgia Public Service Corporation*, 248 U. S. 372.

The company obtains its electrical current from two sources, viz.: from its own plant situated in the village of Warsaw, and by purchase from The Perry Electric Light Company. This last named corporation is owned practically by the same persons who own and operate the Warsaw Company, and while the two corporations are separate corporate units their identity of management and mutual interdependence can not be disputed. The Perry Company is apparently the owner of an up to date plant which produces electricity at a reasonable cost, while it is claimed that the Warsaw plant is antiquated, and that its product costs an unwarranted price, and that the customers of the company should not be compelled to pay for the operation of an inefficient, obsolete, and worn out plant. The contention of the complainants that the consumers of current should not be compelled to pay the cost of operation of an inefficient, obsolete plant is correct and in harmony with former decisions of this Commission. In *Buck v. Judge*, decided July 24, 1919, Chairman Hill, who wrote the Opinion, quotes former Chairman Stevens in the following words: "It is clear that the public should be required to pay a return only upon a plant which is suited and adapted to its needs, with, of course, a reasonable allowance for future expansion and growth which is just as important for the public as it is for the company; and if a given plant is not suited and adapted to the needs of the public which it serves . . . then clearly and upon the plainest principles of equity

and justice the company should not be entitled to a return beyond that which would be demanded upon a plant properly located, economically constructed, and suited in capacity to the needs for which it is designed”.

And, later, Chairman Hill says, “I believe the public is entitled to be served by a reasonably modern plant which is not obsolete or wasteful in its methods, and which turns out its product with some reasonable degree of economy.”

While the reports of the company show that current was purchased more cheaply than it was produced, the company can not be condemned because it does not purchase all of its current, as it does not appear that the Perry Company was able to supply all of the electricity needed. The company should, however, as soon as practicable, make arrangements to purchase the product required by its customers. The plant in the village of Warsaw should be maintained as a reserve station from which current may be supplied in case of transmission trouble.

An expert in the employ of the Commission made a personal examination of the Warsaw plant and made the statement under oath that it is in a perfectly good operating condition, and is in a fair state of maintenance. If, however, we examine the reports of the company we find evidence of a steady deterioration in the efficiency of the plant or in the business management.

By the annual reports filed by the company, it appears that in 1917 the company produced 250,099 kw.h. of current at a total production cost of \$7394.56, or at the rate of 2.96 cents per kw.h. In 1918, the company produced 165,432 kw.h. at a production cost of \$8177.36 or at a rate of 4.94 cents per kw.h. These figures show an increase in the total cost of production for 1918 over 1917 of 10.6 per cent, and an increase in unit cost of production of 66.9 per cent.

If we go back to the year 1916, we find that the company produced 286,533 kw.h. at a total cost of \$9340.23, or at the unit rate of 3.26 cents per kw.h. These figures show an

increase in total cost of production in 1916 over 1918 of over 14 per cent, but an increase in unit cost in 1918 over 1916 of over 51 per cent.

The complainants in their brief point to the exceedingly large production expenses, but they assume that the difference between the number of kw.h. sold and the amount purchased from the Perry plant is the amount produced at the Warsaw plant. This method of calculation fails to consider the amount of current lost in transmission and at the transformers, which is always large, even in well constructed and well managed plants.

The above figures furnish abundant basis for the report of the division of capitalization of this Commission, which refers to the relative inefficiency of the Warsaw plant and also raises the question as to whether or not the public of Warsaw should be required to pay high rates for electricity solely for the reason that the apparatus which serves it is inefficient.

The figures which should prevail in the decision of this case are as follows:

Fixed capital	\$83,000
Organization	1,500
Materials and supplies.....	13,000
Working capital	6,000
	<hr/>
	\$103,500

The amount of fixed capital has been determined as the result of a careful examination of the plant by an expert in the employ of the Commission. The organization expenses, \$1500, are ample when we consider the circumstances under which this company was probably organized. The claim of the company for \$5000 for this item is unsupported by any evidence and can not be allowed. Materials and supplies, \$13,000, strictly speaking, should not become a part of the capital account, as the item is composed in part of various attachments and tools sold to the customers of the company from time to time in the merchandise branch of the business, but as the profit which arises from

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the sale of these goods is credited to the general income of the company the item may be retained. The item of \$6000 for working capital is sufficiently large for the purposes of the company. An 8 per cent return on the above investment amounts to \$8280. The operating expenses for the twelve months ended September 30, 1919, as reported by the company are \$26,379.60, adding \$2000 for amortization brings the total operating expenses to \$28,379.60.

The above figures tabulated are as follows:

Return on investment at 8 per cent.....	\$8,280.00
Operating expenses, taxes, and amortisation.....	28,379.60
Total revenue required	\$36,659.60
Income from present rates, municipal street lighting. \$4,596.82	
Other municipal lighting.....	116.49
Flat rate lighting	87.00
Power (corrected to schedule rates).....	10,081.10
Merchandise and jobbing	2,841.33
	\$17,721.24

Revenue required from commercial metered lighting..... \$18,938.86

Block Meter Rates Required:

First 10 kw.h. per month at 15 cents per kw.h.
 Next 30 kw.h. per month at 12 cents per kw.h.
 All over 40 kw.h. per month at 9 cents per kw.h.
 Prompt payment discount, 5 per cent.
 Minimum monthly charge, \$1.00.

From the figures before the Commission, it is estimated that the above rates will produce \$18,997.75, or a total income of \$36,718.99.

It was stipulated by the parties upon the hearing that if the Commission by its decision should determine that the rates charged by the company for electricity under the schedule in force on the 14th day of May, 1919, or under any subsequent modification of that schedule, should be reduced, in that event the difference between the rates charged under the schedule in force on the date named or under any modified schedule, should be paid back to the customers of the company as a rebate upon all future bills, it being stipulated and agreed that the decision of the Commission shall take effect as of July 1, 1919, and the rebate should date from that day.

The company has modified the schedule in effect on May 14, 1919, by an amendment in force December 25,

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1919. By this amendment block meter rates are made step meter rates.

An order should be entered in accordance with the foregoing opinion.

All concur.

No. 518:389

Petition or Complaint of NEW YORK AND STAMFORD RAILWAY COMPANY under subdivision 1, section 49, Public Service Commissions Law, and section 181, Railroad Law, for permission to increase passenger fares; under section 29, Public Service Commissions Law, for permission to put into effect new tariff on short notice; under section 53, Public Service Commissions Law, for permission to exercise fare rights under amendments to municipal franchises. [Case No. 7589.]

A provision in a franchise granted June 26, 1913, to a street railroad company, requiring it to interchange free transfers with another street surface railroad company, does not deprive this Commission of jurisdiction to do away with such transfers as part of a plan to secure to the latter company additional revenue necessary to yield a fair return on its investment.

Increases of fare and changes of boundaries of zones in order to yield such additional revenue considered, and approved as modified.

Decided July 22, 1920.

Appearances:

Graham, McMahon, Buell & Knox, 42 Broadway, New York city, attorneys for petitioner.

Benjamin I. Taylor, Port Chester, Counsel, for the Town of Harrison.

C. DeWitt Rogers, 141 Broadway, New York city, attorney for the Village of Larchmont.

Ralph A. Gamble, 347 Madison avenue, New York city, Counsel for the Town of Mamaroneck.

Earnest R. Eckley, Counsel for the Village of Mamaroneck.

William E. Lyon, jr., 286 East Bolton Road, Mamaroneck, in person.

William A. Wilding, Town Clerk of the Town of Harrison.

KELLOGG, Commissioner:

By order of this Commission entered July 1, 1919, this petitioner was permitted to make certain changes in its

zoning system for the purpose of obtaining increased revenue, which under the facts submitted it appeared the petitioner was then entitled to on account of the increased cost of operation.

In that case the financial condition and needs of the petitioner were considered and set forth in detail in the Opinion of Commissioner Fennell, upon which the order was based.

Claiming that the relief experienced by way of added revenue in the changes then inaugurated has proven insufficient to meet the constantly mounting cost of material and labor, this company again appears before this Commission for a still further rearrangement of its zoning plan, and an increase in certain instances of the fare to be charged in such zones.

The petitioner in its petition presented for the consideration of this Commission two alternate plans, known as Plan "A" and Plan "B," dependent upon whether or not it secured a waiver from the Town of Harrison of certain fare limitations contained in the franchise granted to the petitioner by that municipality.

At the time of the hearing it appeared that not only the Town of Harrison had not waived its franchise restrictions, but further that the Village of Mamaroneck had withdrawn the waiver which it had previously extended, a copy of which was attached to the petition. This necessitated the submission of a third zoning plan, known as Plan "C" which, with certain amendments suggested upon the hearing, is now here for consideration.

This latter plan does not increase the rate of fare in the village of Mamaroneck, or by change of zone increase the cost of transportation over the petitioner's lines within any portion of that village. It does, however, propose to do away with the free transfer privilege now extended reciprocally within the village limits to passengers of this petitioner desiring to further travel over the lines of The Westchester Street Railroad Company, and to passengers of The West-

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chester Street Railroad Company desiring to further travel within the village limits over the line of the petitioner.

The Village of Mamaroneck opposes this plan resulting in the abolition of free transfer privileges, standing upon what it claims to be its legal rights in the matter. It produces evidence to show that on June 26, 1913, when the Village of Mamaroneck was granting certain privileges to The Westchester Street Railroad Company, it imposed as a condition of such grant the requirement that that company should make a contract with this petitioner whereby passengers on either line desiring to be carried to points over the line of the other carrier, in the village of Mamaroneck, should be carried free by the second carrier. This contract was also to provide for the use of the tracks of one company by the other company, bringing it within the provisions of what was then section 78, and is now section 148, of the Railroad Law. The contract accordingly was entered into by these parties, as required by this municipality.

The Village of Mamaroneck claims that thereby a contractual relation was established between the petitioner and that municipality whereby it must carry to all points in the village of Mamaroneck without charge passengers brought to it by The Westchester Street Railroad Company, and who had paid fare to that corporation. The famous decision *In the Matter of Quinby* is relied on in support of this contention.

It might be urged, and perhaps with conclusive force, that the *Matter of Quinby* is clearly distinct from this case because here the provision as to free transfers relied on is not imposed as a condition for any grant of privilege to this petitioner, but inserted in a permit granted to a third party. It is not probable that the courts will hold that where this Commission possesses jurisdiction over a corporation in regard to the subject matter, it will be ousted of such jurisdiction by the conditions of a franchise granted to a third party.

It also seems to be quite evident that the clear and express delegation of power to this Commission thought to be lacking in the *Quinby* case, as to increase of fares, in those instances where franchise restrictions prevail has, as to free transfers between corporations, been carefully by express language extended to this Commission. For we find in the Public Service Commissions Law, section 49, subdivision 7, as enacted in chapter 680 of the laws of 1910, this express provision covering a contract of this nature:

"Until and except as the public service commission shall otherwise prescribe as to any street railroad corporation or corporations pursuant to the provisions of this chapter, every street surface railroad corporation entering into a contract with another such corporation as provided in section seventy-eight [now 148] of the railroad law shall carry or permit any other party thereto to carry between any two points on the railroads or portions thereof embraced in such contract any passenger desiring to make one continuous trip between such points for one single fare, not higher than the fare lawfully chargeable by either of such corporations for an adult passenger."

There would therefore seem to be an express delegation of power to this Commission to take action in regard to transfers in such cases.

But another reason suggests itself as to why this provision in the franchise to The Westchester Street Railroad Company does not deprive this Commission of jurisdiction to act upon this subject, such provision as to free transfers is contained in the franchise granted June 26, 1913, and subsequent to the enactment of the Public Service Commissions Law. Clearly within the law applicable in such cases, as interpreted by the decisions of the Court of Appeals handed down July 7, 1920, this Commission has jurisdiction to act. (*In the Matter of the Application of the City of Niagara Falls, Relator against Public Service Commission, Second District, and International Railway Company; People ex rel. Garrison, as Receiver, against Nixon.*)

This brings us to the merits of the application.

The petitioner operates a street surface railroad from the New Haven station in the city of New Rochelle easterly to the city of Stamford in the State of Connecticut. Its main line is 19.37 miles in length, and its branch lines approximate 7 miles, making a total trackage of 26.37 miles, of which about 16 miles is in the State of New York. Between the city of New Rochelle and the Connecticut-State line, it traverses in the following order these municipalities in the county of Westchester: village of Larchmont; town of Mamaroneck; village of Mamaroneck; town of Harrison; village of Rye; village of Port Chester.

The zones are numbered commencing at the west. Zone one as now existing extends from the terminal of the road at Mechanic street in New Rochelle easterly to Dean Place in the village of Larchmont, a few feet easterly of the boundary line between that village and the city of New Rochelle. The fare in this zone is five cents. Its approximate length is 1.05 miles. No change of fare or zoning is asked for affecting this zone. Free transfers in New Rochelle to The Westchester Electric Railroad Company's lines now granted are continued.

Intermediate the easterly line of the city of New Rochelle and the Connecticut-State line there are now three zones in each of which a fare of five cents is charged. There is some overlapping, and also provisions for transfer between certain of the zones for an additional charge of three cents. Free transfer privileges are also extended in this territory, not only over the lines of the petitioner, but over, as has already been indicated, The Westchester Street Railroad Company's lines in the village of Mamaroneck. This territory it is now proposed to subdivide so that in place of three zones there will be four and a part of a fifth within the State of New York.

These proposed new zones are as follows:

Zone No. 2: Between Dean Place and the Eastern boundary of the town of Mamaroneck. Approximate distance

2.20 miles. Fare five cents with free transfer privilege to and from cars of the Larchmont Manor line in the village of Larchmont.

Zone No. 3: Between the western boundary of the village of Mamaroneck and the Mamaroneck-Harrison Town line. Approximate distance 1.90 miles. Fare five cents.

Zone No. 4: Between the western boundary of the town of Harrison and North street, village of Rye. Approximate distance 1.80 miles. Fare six cents.

This zone contains a subdivision extending between the western and eastern boundary of the town of Harrison in which the fare is five cents.

Passengers boarding cars in zone No. 4 east of the Harrison-Rye line will be entitled to ride to Purchase street and Purdy avenue in the village of Rye for a six cent fare.

Zone No. 5: Between North street in the village of Rye and Liberty Square in the village of Port Chester. Approximate distance 2.61 miles with laps of approximately 0.44 miles extending to Mill and Main streets, village of Port Chester. Fare six cents with free transfer privilege to and from cars of the Rye Beach-Rye Station line and the Rye Beach-Port Chester line.

Passengers boarding cars in the village of Rye, west of Purchase street and Purdy avenue will be entitled to ride to the Rye-Harrison Town line for a six cent fare. [See note.]

Zone No. 6: Between Liberty Square, Port Chester, and Railroad and Greenwich avenues, Greenwich, Conn. Approximate distance 3.12 miles, with lap extending from Liberty Square to the New York and Stamford Railway Company's car barn in Port Chester, approximate distance .84 miles. Fare six cents. [See note.]

Passengers boarding cars of local lines in the village of Port Chester are entitled to transfer to points in zones

NOTE: Passengers boarding cars in zones No. 5 or No. 6 outside the village of Port Chester are entitled to transfer to local lines in the village of Port Chester upon payment of three cents for transfer.

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No. 5 or No. 6 outside the village of Port Chester, including Rye Beach line, upon payment of three cents for transfer.

Passengers boarding cars in the village of Port Chester are entitled to free transfer good within the village of Port Chester.

The Rye Beach line between Liberty Square, Port Chester, and Rye Beach, is included in zone No. 5. Approximate distance 3.17 miles.

The proposed plan also provides for additional zones in the State of Connecticut.

Although a substantial portion of the territory of proposed zone No. 6 is within the State of New York, the overlapping therein of proposed zone No. 5 to Mill and Main streets, a few feet distant from the State line, leaves approximately only four zones within the State of New York to be traversed by passengers within its boundaries. So that where three zones now exist, which may be traversed at an aggregate cost of fifteen cents, under the new plan the cost of journeying over the same area by a through passenger would cost twenty-two cents.

The overlapping of zones Nos. 4 and 5 in the village of Rye is a departure from the original plan of the petitioner.

The franchise restrictions as to fares imposed by the Town of Harrison and the Village of Mamaroneck, as to local passengers within their boundaries, have been preserved.

The contention was made by the Town of Harrison that the franchise restriction as to rates of fare to be charged to passengers between points within its boundary and certain points within the town of Rye should also as a matter of law be preserved.

The position, however, taken by the Supreme Court *In the Matter of Koehn v. Public Service Commission*, 107 Misc. 151, and frequently followed by this Commission, is against this contention, and provisions of this nature do not deprive us, under our construction of the law, of the power to prescribe a reasonable rate of fare between municipalities.

Without going into detail, it is sufficient to say that an examination of the maps in evidence, together with a description of the proposed new zones as above outlined indicate that the burden of the increased fare, if permitted, will be borne substantially in equal burden by each of the localities affected.

This brings us to the consideration of the main proposition as to whether under the financial conditions at present the rates of fare now collected are unjust and should be increased as requested, in order that the petitioner may obtain an adequate revenue within the provisions of the law entitling it thereto.

A study of this company's condition made in case No. 6886, coming down to the close of March 1919, renders necessary consideration of its further history during only a comparatively short portion of the time, and materially shortens our labor.

In the year 1917 the net corporate income of this company, without making any allowance whatsoever for interest charges or for amortization of debt discount and expense, was only \$13,494.85.

In the year 1918 such income, also excepting the items of interest and amortization changed to a deficit of \$5461.50.

For the first three months of 1919, as appears from the former cases, there was a deficit in operating income of \$14,184.89, to which should be further added all payments for lease of road and track and terminal privileges.

In an attempt to remedy this very serious situation, where the actual cost of operation exceeded the revenue, the increased fares were permitted in that case. They appear to have been entirely inadequate. We find that the corporate income for 1919, deducting all interest items and amortization of debt, still shows a balance on the wrong side of the ledger of a deficit of \$1358.22.

Still further comparing the expenses of the first quarter of 1920, under the increased fare, with the same period of

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1919, under the former fares, we have the comparative following result:

	1919	1920
Operating revenues.....	\$77,186.46	\$84,213.81
Operating expenses.....	86,366.03	95,848.77
Net operating revenue (loss).....	\$9,179.57	\$11,634.96
Taxes.....	\$5,085.91	\$5,580.92
Operating income (loss).....	\$14,865.48	\$17,816.88
Non-operating income.....	\$80.59	\$132.48
Total income (loss).....	\$14,184.89	\$17,083.40

Thus the increased cost of labor and materials more than absorbed the increase of revenues from the raise in fares, and left the company in a comparatively worse condition than it found itself in the previous year before the new fares went into effect.

At the time of the order in the previous case, the rate paid conductors and motormen was from thirty-nine cents to forty-five cents per hour. At about the time of the increase it was raised from forty-four cents to fifty cents per hour. These actual payments by the company should be allowed, unless they were made in bad faith or unnecessarily. There is nothing in the present condition of the labor market, or in the condition which has prevailed during the past year, and the payments made in other localities, which will give any weight to the suggestion that the company is improvident in paying these wages, and that it should not be allowed therefor in fixing a rate of fare. Substantially similar increases, none of which are questionable, were made in the wages paid to other employees. Details were submitted of largely increased expenditures for material, which are quite in accord with the experience of this Commission encountered in other researches, and give rise to no suspicion either as to their accuracy or necessity.

From the foregoing it is probably apparent that this petitioner is entitled to a decided increase in revenue. It must

indeed obtain some increase merely to cover its operating expenses, to say nothing of the return, to which under the law it is entitled, on its invested capital.

The rearrangement of its zones and their increase in number makes it difficult indeed to estimate the probable result of putting into effect the now proposed plan. Figures have been submitted by the petitioner indicating that it will result in a net operating revenue of \$136,559.25. This estimate is based upon the following details:

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NEW YORK AND STAMFORD RAILWAY COMPANY, PASSENGER REVENUE AND OPERATING EXPENSES BY ZONES
Year 1920, Estimated (Scheme C)

	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zone 6	Zone 7	Zone 8	Total
Passenger revenue.....	\$39,858.85	\$45,422.00	\$28,386.50	\$30,853.75	\$136,637.16	\$126,635.04	\$81,191.58	\$70,089.78	\$559,074.66
Operating expenses.....	42,558.10	42,873.16	25,025.33	25,962.96	112,601.88	78,398.82	46,907.94	48,187.22	422,515.41
Net passenger revenue.....	\$2,629.25	\$2,548.84	\$3,361.17	\$4,890.79	\$24,035.28	\$48,236.22	\$34,283.64	\$21,902.56	\$136,559.25
Revenue passengers.....	797,177	908,440	567,730	617,075	2,277,286	2,110,584	1,353,193	1,168,163	9,799,648
Rates of fare.....	\$.05	\$.05	\$.05	{ \$.05 .06 }	\$.06	\$.06	\$.06	\$.06	.....

These figures are not challenged by any of the municipalities whose interests are at stake. From such consideration as the subject matter is capable of, it would seem that although the outcome is largely problematical, this estimate is as satisfactory as any that can be made as to a future, when there will undoubtedly be experienced both a change of costs and a variance of travel, which on the one hand may be increased by the growth in population so marked in this territory, and perhaps on the other hand be decreased by the increased fare proposed.

The figure of \$136,000 must be reduced by \$23,000 which this company pays for the lease of road and equipment, and also \$25,000, its annual disbursement for taxes, which would leave only a balance of \$88,000 for return on the investment, on a road with a trackage of more than 26 miles, much of which is on paved streets of populous communities.

It will further be noted that this company, in setting aside reserve for depreciation accruing on the property, makes an allowance of 1 per cent per annum on the actual cost of its depreciable tangible property. In the view of this Commission this is insufficient. It is announced in our pamphlet issued August 20, 1918, entitled "Uniform System of Accounts for Electric Railroad Corporations" on page 15, that in rate and other cases a minimum of 2 per cent will be considered sufficient for this purpose in ordinary cases. Taking only this minimum there should be set aside an amount in addition to the amount reserved an additional sum of \$14,000. This would reduce to \$74,000, the sum which may be considered as return on the investment, if the above estimated increase of net operating revenue is realized.

This return of \$74,000 is only 8 per cent on an investment of \$925,000. Under no conceivable circumstances can it be decided that a line of this length in this locality is worth so small an amount. The fixed capital, as shown by its last annual report, was \$1,921,165.43, more than twice the amount on which a return of 8 per cent would accrue

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estimated added revenue. Its outstanding bond issue, authorized by this Commission, alone amounts to \$1,351,000.

It is safe, therefore, to say that under present conditions the collection of fares proposed under the plan suggested would not result in any inordinate return. In order that actual experience may be the basis of further future action, the order fixing fares should be only for a short period in order that the actual results may be observed and such action taken thereon as may be warranted thereby. One year would seem to be a proper length of time for this purpose.

The proposed zoning plan, even as modified as above suggested, requires in one particular further modification, which may and undoubtedly will result in some slight diminution of the estimated revenue, and make the right of the company to the relief proposed to be granted still clearer.

It has already been noted as to the proposed zones Nos. 4 and 5 there is an overlapping permitting passengers in each part of the village of Rye to travel to and from the westerly boundary of that municipality, although their journeying may be partly within the two zones. This amendment was made as a result of suggestions made at the hearing.

Later and more careful examination of the papers in the case, not possible at the hearing, indicates that this overlapping should be still further extended so as to include all passengers traveling from one point to another point in the village of Rye.

Under the present proposed plan passengers in that municipality westerly of Purchase street and Purdy avenue, which would include most of the local travelers, are accorded this privilege. The petitioner, however, rests upon the consent given by the village for his right to increase the fare in that municipality. It so recited in its petition, and a copy of the consent is part of the moving papers.

It does not definitely appear but probably may be assumed from this allegation and procedure of the petitioner that a franchise fare restriction exists in the village of Rye, con-

sent for the waiver of which it is necessary to secure in order to progress this proceeding. A certified copy of the action of the village board of trustees is as follows:

"RESOLVED, that the members of this Board go on record as favoring the proposed increase in the rate of fare to be charged on the New York & Stamford Railway, *said rate of fare, however, not to exceed six cents.*"

This resolution evidently was accepted by the petitioner, and no appearance was made at the hearing on behalf of the Village of Rye, the authorities of which evidently relied upon the limitation of the increase of fare to six cents. Any order, therefore, which permits the charge of twelve cents for transportation between any two points within that municipality would be in violation of this consent, and should not be authorized.

Passengers should be carried between all points in the village of Rye for one fare of six cents.

With this modification the petitioner should be permitted on short notice to file a tariff and to collect fares under the plan proposed, the order to be effective for one year and until the further order of this Commission.

All concur.

No. 519 : 403

In the Matter of the Petition of the SCHENECTADY RAILWAY COMPANY under section 49 of the Public Service Commissions Law and section 181 of the Railroad Law to increase passenger fares. [Case No. 7549.]

1. Where a trolley system consists of both urban and interurban mileage and is operated as one system about sixty miles in length, it being found that the same patrons were not to any large degree making use of the different parts of the system indiscriminately, and there was comparatively little continuous riding over different divisions of the system,

Held, that the rates on the different divisions should be treated on their respective merits, and that for rate making purposes the system should not be treated as a unit.

2. The corporation proposed in its application under section 49 of the Public Service Commissions Law and section 181 of the Railroad Law, certain increases in rates on its various divisions, including local fares in the city of Schenectady. In that city the proposed fare was limited to 7 cents by reason of the necessity of securing a release from the 5 cent limitation on the local fare, contained in the consent of the local authorities, and the evidence shows that the increased fare in said city will produce on the city lines only a nominal return on investment. Said city lines constitute a very large proportion of the entire railroad.

Held, that it would be unreasonable to increase the rate of return upon one of the interurban divisions beyond a reasonable percentage on the theory that the rates as a whole must yield a reasonable return upon the entire investment.

Decided July 27, 1920.

Appearances:

H. T. Newcomb for petitioner.

Hon. George R. Lunn, Mayor, and *Hon. Frank Cooper*, Corporation Counsel, for the City of Schenectady.

Edward S. Coons for the Village of Ballston Spa.

James A. Leary for commuters from Saratoga and Ballston and residents of Ballston Lake and other places who travel on tickets.

Arthur L. Andrews, Corporation Counsel, for the City of Albany.

C. I. Johnson for people of Ballston Lake.

E. W. Sanford and *J. W. Brockway* as a committee representing the West End Improvement Association.

Hun, Parker & Reilly (by Mr. Reilly) for residents of Latham.

Peter K. Best for people in the middle zone.

Charles H. Collins, individually, and for the Albany-Schenectady Interurban Association.

HILL, Chairman:

Petition filed May 28, 1920, by Schenectady Railway Company for leave to increase its passenger fares, both urban and interurban.

The rates proposed to be increased as well as others were the subject of a determination by this Commission which resulted in an order bearing date May 20, 1919, case No. 6583, and an accompanying opinion. The record in that case forms part of the record herein.

The prayer of the present application is that the fare in the city of Schenectady be increased from 6 cents to 7 cents, based upon a waiver by the local authorities of that city of a limitation to 5 cents contained in certain of the local consents or franchises so as to permit of such increase, but not beyond 7 cents, and that the interurban fares be increased from 5 cents to 6 cents for each zone in the Albany division, and from 6 cents to 7 cents for each zone in the other interurban divisions, the enlarged revenue from all such increases being estimated at \$283,000. No changes are proposed in ticket, commutation, or school rates.

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For the Year 1919

Gross revenues were.....	\$1,664,282.46
Operating expenses	1,380,824.73
Net operating revenue.....	\$283,957.73
Taxes	90,683.25
Income	\$193,274.48
Non-operating income	8,913.87
Gross income	\$197,187.85
Interest on funded debt.....	\$133,800.00
Other interest deductions.....	7,326.00
Other deductions	10,358.80
	151,484.80
Net corporate income	\$45,703.05

In the former case we assumed a rate base, or amount upon which return should be computed, of \$5,885,019. It will be seen that the gross income of \$197,187.85 for 1919 is about 3.35 per cent on this sum. The occasion of this application is, however, that on June 1, 1920, the company increased its wage payments in the sum of \$25,000 per month, or \$300,000 per year, so that assuming volume of travel and expenses other than wages to continue unchanged, the estimated increase in revenue of \$283,000 would be more than absorbed by the wage increase and the rate of return would be slightly lower than for 1919. There have been no substantial changes in the physical property of the company since the former determination.

The new wage scale increases all wages 15 cents per hour with time and one-half for overtime. This brings the present scale to a range of 56 to 61½ cents per hour for platform men, and a range of 57½ to 72½ cents per hour for other employees. Evidence was given, and not contradicted, to the effect that the increased wages were considerably less than those paid a great many other crafts in the city of Schenectady, many of which require less skill, and that therefore the railroad officials regarded them to be reasonable under existing conditions. It was further shown that they were the same paid for similar services in Buffalo, less than paid in Cleveland, and in the opinion of the general manager comparable with the wages which will be paid under arbitration settlements now pending. This witness further

stated that the company would have been unable to operate its property without making the advanced schedule.

A statement was introduced in evidence showing the approximate amount of investment on interurban and city lines together with estimated amount of net income available for interest and dividends applicable thereto for the year ended April 30, 1920, as below:

SCHENECTADY RAILWAY COMPANY

Statement showing approximate amount of investment on interurban and city lines together with estimated amount of net income available for interest and dividends applicable thereto, year ended April 30, 1920.

	Total	Albany	Troy	Ballston	City
Approximate amount of investment.....	\$7,238,354.10	\$671,861.06	\$710,777.57	\$937,823.04	\$4,917,892.43
Estimated amount of net income available for interest and dividends.....	\$206,773.86	\$98,686.79	\$15,784.34	\$28,006.34	\$64,296.39
Per cent on investment.....	2.86%	14.69%	2.22%	2.99%	1.31%

SUMMARY

	Total	Interurban	City
Approximate amount of investment.....	\$7,238,354.10	\$2,320,461.67	\$4,917,892.43
Estimated amount of net income available for interest and dividends.....	\$206,773.86	\$142,477.47	\$64,296.39
Per cent of investment.....	2.86%	6.14%	1.31%

This showing is based upon the company's book values of investment of \$7,238,354.10. These values have never been accepted by the Commission, nor is it necessary for the purposes of this case to determine a valuation of the company's property, no adequate return from the proposed rates being possible. It is noticeable that there exists a great disparity in the rate of return on the various divisions, such return ranging from 1.31 per cent on the Schenectady city lines to 14.69 per cent on the Albany division.

In the preceding determination (case No. 6583), the Commission took notice of a corresponding disparity in the returns from the different divisions, and said with regard thereto:

This presents the question whether the system should be treated as a whole without regard to the varying profitableness or unprofitableness

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of the various divisions, or whether each division should be treated on its individual merits.

and also:

Whatever may be the best method as to urban traffic, I think the arguments in favor of treating an interurban system as a unit and imposing the same rate of fare on different divisions regardless of their relative profitableness must be considered in each case according to its particular facts. In a case where the same people are found to be using the various divisions indiscriminately, or where the riding over different divisions is found for the most part to be continuous, a uniform rate would not be unjust, where otherwise it might be. It may be claimed that rates of fare should not and practically can not be dissected and considered on their individual merits, and we are aware that the United States Railroad Administration has practically adopted this view by promulgating a uniform rate of fare on all railroads within its jurisdiction. But when we turn to the statute for guidance we find that each rate, fare, and charge must be separately and distinctly specified in the tariff schedules, so that in case of complaint each may and does become practically an issue in itself. We find also that the determination of such an issue rests upon the justness and reasonableness of the given rate, "with due regard among other things to a reasonable average return," etc. Uniform rates arbitrarily fixed would thus seem to be the antithesis of that which the New York statutes demand.

For the purpose of determining the character of the traffic over the Schenectady system, a check was made under the direction of the Commission in December, 1918, which indicates that of the westbound passengers on the cars of the Albany division about 8 per cent continued through Schenectady to points on the Saratoga division, while of passengers moving in the opposite direction about 16 per cent continued through. This is substantially all of the interdivision traffic, there being practically none between either the Albany or Saratoga divisions and the Troy division. Every fact in the case would seem to demand that the rates on the Albany division be considered on their merits as applied to that division. Inasmuch as the patrons of this division are now paying even more than their full share, we can find no justification for increasing these rates.

The company complains of this feature of the determination of the previous case, and, realizing that if the Commission follows the precedent so established, the new rates will

be considerably less than those contemplated, it has filed a special brief on this question in which it advances the propositions: (1) that the Fourteenth Amendment of the Federal Constitution guarantees petitioner against the exercise of legislative power which would require it to operate its property at rates which will not as a whole produce a fair return upon the fair value of such property; and (2) that the return on all the property subject to the legislative control may not be forced below the confiscatory limit by approximating the return on part of the property to that limit and thus denying opportunity to recoup losses which occur on other portions of the property subject to the same authority. The applicant's position is that in this proceeding its entire schedule of rates is in issue, and that when it is concluded the Commission will have determined the complete schedule of maximum rates applicable to all the business; that in a case involving the validity of an order enforcing a scheme of maximum rates, the finding that the enforcing of such scheme will not produce an adequate return for the operation of the railroad in and of itself demonstrates the unreasonableness of the order; that in such a case the unreasonableness as against the public of any particular rate included in the proposed schedule can not be given consideration if the schedule as a whole fails to produce an adequate return.

In support of these propositions the petitioner refers to certain decisions of the Federal Courts, viz: *Minnesota & St. Louis R. R. v. Minnesota*, 186 U. S. 257; *Atlantic Coast Line v. North Carolina Corporation Commission*, 206 U. S. 1, 26-27; *Missouri Pac. R. R. v. Tucker*, 230 U. S. 340-347; *Wadley Southern Ry. Co. v. Georgia*, 235 U. S. 651; *Missouri v. Chicago, Burlington & Quincy R. R.*, 241 U. S. 533-538; *Oklahoma Operating Co. v. Love*, U. S., not yet reported; *Ohio Valley Water Company v. Ben Avon Borough*, U. S., not yet reported; *County of Stanislaus v. San Joaquin & Kings River Canal & Irrigation Co.*, 192 U. S. 201. A careful examination of these authorities,

however, fails in our opinion to disclose any support for the application sought to be given them in this case.

The *Minnesota* case, 186 U. S. 257, was where the Minnesota Commission proceeded against certain railroads to compel them to adopt certain rates on coal in carload lots, and was upheld. This case was cited by counsel because the court held that evidence on the part of the railroad showing that if the rate fixed by the commission for coal in carload lots were applied to *all* freight the road would not pay its operating expenses did not *per se* establish the unreasonableness of such rate. But the court added (p. 266): "But it also appears that if the old rate upon hard coal in carload lots . . . were adopted as an average rate for *all* freights the freight earnings of the road would have been largely increased." The decision was based upon a finding that the rates proposed yielded a reasonable profit upon *coal*. The case clearly has no application here except to uphold a rate which is found *in itself* to be reasonable.

In *Atlantic Coast Line v. North Carolina Corporation Commission*, 206 U. S. p. 1, the sole point decided which has any bearing here was that the State has power to compel a railroad to perform a particular and specified duty necessary for the convenience of the public even though it may entail some pecuniary loss, provided the rates as a whole afford adequate remuneration. *Missouri Pac. R. R. v. Tucker*, 230 U. S., is where the State legislature attempted to establish maximum rates for transportation of oil and gasoline for less than the cost of the service and the court said that to require a railroad company to charge such rates for transportation as prevent it from obtaining a reasonable return *for the service rendered* amounts to deprivation of property without due process of law. It is noted that in both cases the cost of maintaining the particular rate was the determining consideration.

Missouri v. Chicago, Burlington & Quincy R. R., 241 U. S. 533, repeats the holding of previous cases to the effect that

a State may not by mandamus compel a railroad to comply with rates fixed by a State law unless an opportunity is afforded to test the question of compensation, and that the railroad has a right to test the rates prescribed by a State statute as a unit and to obtain an injunction restraining the enforcement of such a law in its entirety if it is found to be confiscatory.

In the *Ohio Valley Water* case the court held that an order of a State commission prescribing a complete schedule of maximum future rates is legislative in character, and that in all such cases if the owner claims confiscation of his property will result the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts, otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment. This case would seem to be inapplicable to the question under discussion. To the same effect is the case of *Oklahoma Operating Co. v. Love*, not yet reported.

County of Stanislaus v. San Joaquin & Kings River Canal & Irrigation Co., 192 U. S. 201, is particularly relied upon by the petitioner. That case arose under a California statute which required the local authorities of different counties in which the company operated to fix rates for its service so adjusted as to yield net annual receipts of not less than 6 per cent upon the value of the property of the company. The rates fixed by the County of Stanislaus were upheld. The court said, however:

It is of course impossible to say what rates may be adopted in the other counties through which this canal runs and that is one of the embarrassments under which the parties suffer from the language of the statute of 1885. Heretofore the company has fixed its own rates therein. Exactly how the question may be hereafter determined as to the percentage of income where there are three different boards of supervisors who may fix rates for their respective counties, each differing from the other, is not made clear by the statute. . . . Hereafter in case the other counties should fix rates in such manner

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that taken as a whole the rates in the three counties would not insure an income of at least six per cent as provided for in the act of 1885, the company would of course not be bound to accept such rates and a decree in this case would not bind it in regard to the propriety of rates for the future, as fixed by the ordinance of 1896, for the County of Stanislaus.

It is clear that these remarks of the court were purely by way of explanation of the effect of the judgment and were no part of the judgment itself. Furthermore the question there under consideration arose by virtue of a statute and not under the Fourteenth Amendment. What the court has really held with reference to such cases is shown further on.

In this case the State is not attempting to impose upon the petitioner an entire scheme of rates, as was the case in *Missouri v. Chicago, Burlington & Quincy R. R. supra* and in *Reagan v. Farmers Loan and Trust Company*, 154 U. S. 360, and kindred cases where an entire body of rates is prescribed by legislative act.

The rate schedule or scheme proposed by the company does not contemplate a reasonable return upon its property as a whole, nor would it be possible for the Commission to frame a complete scheme of rates over the entire road designed to evenly and fairly distribute the burden over its different divisions, for the reason that with respect to the largest and most important division viz: the city of Schenectady, the company has by the terms of its local franchise limited itself to a 5 cent fare which only by grace of that municipality it may now increase to 7 cents, which latter rate the petitioner's evidence shows will produce a return upon its property in that division of only 1.31 per cent.

For the reasons stated it is not permissible to treat the proposed rate scheme as a State enactment or regulation made under the authority of such an enactment, establishing rates for transportation, and which if not admitting of the carrier earning such compensation as under all the circumstances is just to it and to the public would deprive the company of its property without due process of law, as inhibited

by the rule laid down in *Smyth v. Ames*, 169 U. S. 466, and the like cases.

The position of the company therefore comes to this, that inasmuch as its own scheme of rates is designed to produce less than a reasonable return, the Commission for that reason is precluded from an examination of the various rates and of the right to exercise its judgment as to the justness and reasonableness of any particular rate included in the scheme, and that where a railroad company is limited by the terms of the franchise which it has accepted in one locality to rates of fare which produce a grossly inadequate return, it should be permitted to recoup such loss by charging correspondingly excessive rates in other localities.

We do not find these doctrines supported by any of the decisions. On the contrary the general rule seems to be that each rate must be reasonable in itself, and that the test of that reasonableness is whether or not the rate yields just compensation for the service performed. Thus where a rate in itself unreasonably low is proposed to be enforced by public authority it is no answer to say that the rates as a whole are sufficient, and in such a case

It does not aid the argument to urge that the State may permit the carrier to make good its loss by charges for other transportation. If other rates are exorbitant they may be reduced. Certainly it could not be said that the carrier may be required to charge excessive rates to some in order that others might be served at a rate unreasonably low. That would be but arbitrary action. (*Northern Pacific v. North Dakota ex rel. McCue*, 236 U. S. at p. 287).

And on page 291, the court quoted from *Interstate Commerce Commission v. Union P. R. Co.*, 222 U. S. 541:

Where the rates as a whole are under consideration there is a possibility of deciding with more or less certainty whether the total earnings afford a reasonable return, but whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable, for if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing or for less than a reasonable rate; on the other hand, if the carrier earned no dividend

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it would not have warranted an order fixing an unreasonably high rate on such article.

We find this doctrine earlier advanced by the same court in *San Diego L. & T. Co. v. National City*, 174 U. S. 739.

In that case the plaintiff brought an action to have water rates fixed by National City under the authority of the legislature of the State of California for water furnished to the city and its inhabitants by the plaintiff declared void and confiscatory by reason of the alleged fact that the entire revenues of the company did not yield a reasonable return on the investment. The plaintiff in addition to furnishing water to National City and its inhabitants also furnished water to the population of the surrounding territory.

In the Circuit Court it was held by Circuit Judge Ross that the complainant could not insist that the rates for water furnished the city and its inhabitants should be so adjusted as to compensate it for losses incurred in the distribution of water outside the city. The learned Judge said in this connection:

Nor can the complainant justly insist that the rates fixed by the municipal authorities of National City for water furnished the city and its inhabitants should be so adjusted as to in any way compensate it for losses, if any, sustained by it in the distribution of water outside of the city. It is quite evident from the record that the maintenance of so extensive a water system for the supply of water of such a sparsely settled territory, taken as a whole, and considering the value of the property, and the depreciation by wear and tear of the plant does not yield the complainant very much above expenses. . . . But for such profits, be they small or great, or even for losses thus incurred, the consumers of water within National City are not responsible. Such losses, if any such have been sustained, must be borne by the complainant as best it can, like all other companies and individuals who embark in undertakings, whose realization does not come up to their expectations and hopes. (74 Fed. 87)

The case went to the United States Supreme Court on appeal from the judgment of the Circuit Court and in the opinion written by Mr. Justice Harlan, at page 758, it is said:

One of the points in dispute involves the question whether the losses to the appellant arising from the distribution of water to consumers *outside of the city* are to be considered in fixing the rates for consumers within the city. In our judgment the circuit court properly held that the defendant city was not required to adjust rates for water furnished to it and to its inhabitants so as to compensate the plaintiff for any such losses. This is so clear that we deem it unnecessary to do more than to state the conclusion reached by us on this point.

A very similar case which elucidates the rule still more clearly is *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, companion to *San Diego L. & T. Co. v. National City* above cited. It was the same company which claimed in the latter case that National City should stand part of its losses sustained outside of the City, in which claim it was defeated. It seems that the supervisors in the territory outside of National City in determining the rates, fixed them on the assumption that the company was supplying 6000 acres with irrigation, which it could do, but was in fact not doing, and the court said:

Of course the amount actually received . . . was correspondingly less than the receipts as estimated by the supervisors upon their assumption . . . The result of this mode of estimate might be that the appellant did not get six per cent on the value of its plant. But here again we have to distinguish between constitution and statute. If a plant is built as probably this was, for a larger area than it finds itself able to supply, or apart from that if it does not, as yet, have the customers contemplated, neither justice nor the constitution requires that say two-thirds of the contemplated number should pay a full return. The only ground for such a claim is the statute taken strictly according to its letter.

Thus we find the state commissions upon the highest authority holding that a mere showing of the need of additional revenue for the service as a whole is insufficient to justify an increase in the rates of a railroad upon a particular division thereof, and that in determining whether the compensation for a particular kind of service is reasonable the cost of the particular service and the reasonableness of the return upon the property devoted to that service

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is the test. Re *Long Island Railroad Co.*, P. S. C., N. Y. 1, P. U. R. 1918-A p. 649. And this Commission has held that the fares of a profitable interurban division can not be unreasonably increased, even though the system as an entirety does not earn a fair return and even though a statute may prevent an increase over 5 cents on the city division. Re *United Traction Co.*, P. S. C., N. Y. 2, vol. VII, p. 207.

The principle laid down in these cases seems to fully cover the question under discussion and to furnish a just and workable rule to be applied to its solution.

The Public Service Commissions Law provides that all charges shall be just and reasonable. This Commission has generally considered a return of approximately 8 per cent on capital invested a reasonable return. It is true the rate of return is not the only criterion of the justness of a rate; other considerations frequently enter in. At the same time a reasonable compensation for the service rendered is the controlling factor, and the Public Service Commissions Law, section 49, provides in paragraph 1 that the Commission in fixing rates shall "with due regard among other things to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservation out of income for surplus and contingencies determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged *for the service to be performed*". In paragraph 2, relating to the fixing of commutation and reduced rates, the maximum prices to be fixed by the Commission are likewise directed to yield reasonable compensation *for the service rendered* and must be just and reasonable. It seems unnecessary to say that the "justness" and "reasonableness" must apply alike to the utility and to the public, nor to point out that obviously a charge for a particular service which yields to the utility a return in excess of what is just and reasonable, is *pro tanto* unreasonable to the public.

With respect to the Albany division, assuming the increase in rates to substantially absorb the increase in wages, the percentage of return on the different lines will not greatly differ from those shown in the foregoing table; but if the Commission refuses an increase on the Albany division the increased expense operates to reduce the rate of return on that division. Exhibit 23 shows that of the total anticipated increase in revenue aggregating \$283,000, \$47,731 would accrue from the Albany division. If this should be allowed that division would show a rate of return based on the allocated valuation shown in Exhibit 20 of 17.45 per cent. If, however, the fare is not increased on that division, the operation under the new scale of wages is estimated to result as follows:

Assumed rate of return, Albany division, on basis of increased operating expense, no increase in fare.

Revenue, operating (Exhibit 18).....	\$238,395
Revenue, other	15,421
Total	\$253,816
Operating expenses, increase allocated on car-mile basis, 844,084 car-miles at 53.63 cents.....	184,532
Gross income	\$69,284
\$69,284 ÷ \$671,861 = 10.31%.	

This rate of return is considerably in excess of the 8 per cent which counsel contends for in his brief. The position taken by the Commission in the former rate case with respect to the principle to be applied to the Albany division would seem to be *res judicata*. We have, however, considered at length the arguments advanced by the company in criticism of that principle, and have concluded that the contention of the company is not well founded and must be denied.

It appears clearly that the rates proposed upon the divisions other than the Albany division will yield a return unreasonably low, and it may be suggested that it is the duty of the Commission to disregard the inadequate rates proposed by the applicant upon these divisions and so adjust all of the rates that while none of them are excessive they will in the aggregate yield a fair return upon all the property devoted

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to the public use. As above indicated this is impossible as to the lines in the city of Schenectady which produce approximately 65 per cent of the net income outside of the Albany division. This leaves only the Troy and Ballston divisions representing the remaining 35 per cent, upon which increases beyond those proposed by the company can be considered. It is fair to assume, however, that the company considers it an unwise and possibly an unprofitable policy to attempt higher rates on these divisions than those proposed, the present rates being higher than those on the Albany division, although even then they are unprofitable. For the year ended April 30, 1920, the return on the Troy division according to the company's figures was only 2.22 per cent, on the Ballston division 2.99 per cent, as against 14.69 per cent on the Albany division, thus yielding an average on all three interurban divisions of 6.14 per cent. If the company desires at any time to consider further increases on the Troy and Ballston divisions, it is at liberty to apply for leave to do so, and under the circumstances, inasmuch as the company does not now demand or contemplate an adequate return, the Commission will grant only the increases proposed on those divisions.

A change in the method of stating specific fares applying to and from Troy and Green Island should be effected at this time in order to overcome a confusing practice. At present a passenger from the west paying fare to Watervliet may obtain free of charge a transfer good on the cars of the United Traction Company to Green Island or Troy, whereas if he remains on the Schenectady car the same additional ride will cost him an additional fare. All fares on the United Traction Company tracks, irrespective of which car is used, should be uniform, as it is all United Traction operation. Therefore, a specific fare should be provided on the cars of the Schenectady Railway between points west of Watervliet and points within that city, and such passengers desiring to travel to Green Island or Troy should pay the United Trac-

tion Company's fare, enjoying in each locality the same transfer privileges applying to that company's traffic. The same principle should apply also to westbound passengers.

On the Saratoga division the same principle should be made to operate with respect to the traffic carried in the cars of the Schenectady Railway over the tracks of the Hudson Valley Railway.

An order will be entered accordingly.

Commissioners Irvine and Barhite concur; Commissioners Kellogg and Van Namee not present.

In the Matter of the Complaint of RESIDENTS OF UTICA
against UTICA GAS AND ELECTRIC COMPANY as to price
of gas. Petition of the company for rehearing and modi-
fication of order of April 1, 1920. [Case No. 3399.]

Increase in price of gas in Utica district including the city of Utica.

Increased cost of production because of increase in cost of gas oil
and coal examined and held to justify increase of rate.

The Commission will not take upon itself the burden of saying
from which of several competitors a company should have purchased
its supplies, always providing the contract entered into is not unrea-
sonable in its terms nor in price materially different from the prevail-
ing market price of the supplies at the time of purchase.

Decided July 29, 1920.

Appearances:

Neile F. Towner, Albany, and *Arthur J. Foley*, Utica,
attorneys for Utica Gas and Electric Company.

J. F. Hubbell, Utica, attorney for the Utica Chamber of
Commerce.

G. E. Dennison, Assistant Corporation Counsel, City of
Utica.

VAN NAMEE, Commissioner:

On April 1, 1920, an order based on an opinion written
by Commissioner Fennell and adopted by the Commission
was issued in this case. In his opinion the Commissioner
dealt extensively with the differences in the claims of the
city and of the Utica Gas and Electric Company, which will
hereafter be called the company, and decided that the reason-
able cost of producing gas in the city of Utica was \$.995
per M cu.ft. The company's figures, based on its 1919
experience, showed an expense of \$1.063 per M cu.ft. from
which was deducted various items claimed by the city
amounting to \$.068 per M cu.ft. which resulted in the
figures of \$.995 per M cu.ft. Taking the rate base claimed

by the city, \$1,153,500, and allowing an 8 per cent return on this of \$92,380, it was found that based on the 1919 sales this return was equal to \$.202 per M cu.ft. Adding this to the \$.995 above found as a reasonable cost of gas gives the figure of \$1.197. The net rate asked for by the company was \$1.15 per M cu.ft., to which in calculating the return \$.015 was added for forfeited discounts, minimum bills, etc. It therefore appears that the reasonable return to which the company was entitled was \$1.197 per M cu.ft. under the 1919 figures. The rates asked for would produce \$1.165 per M cu.ft. The order of April 1, 1920, therefore fixed the rates effective April 15, 1920, at:

Block Meter Rate:

First	25,000 cu.ft. per month,	\$1.25 per M cu.ft.
Next	25,000 cu.ft. per month,	\$1.15 per M cu.ft.
Next	50,000 cu.ft. per month,	\$1.05 per M cu.ft.
Next	150,000 cu.ft. per month,	\$1.00 per M cu.ft.
Next	250,000 cu.ft. per month,	\$0.90 per M cu.ft.
All over	500,000 cu.ft. per month,	\$0.85 per M cu.ft.

Prompt payment discount, 10 cents per M cu.ft.

Minimum charge 50 cents per month.

On April 30, 1920, the company filed a petition asking for a reopening of the case for the purpose of showing that, based on Commissioner Fennell's opinion together with the increased cost of gas oil, labor, and other materials, the company was entitled to a further increase in rates and proposed the following schedule as a fair and reasonable one:

Block Meter Rate:

First	25,000 cu.ft. per month,	\$1.50 per M cu.ft.
Next	25,000 cu.ft. per month,	\$1.40 per M cu.ft.
Next	50,000 cu.ft. per month,	\$1.30 per M cu.ft.
Next	150,000 cu.ft. per month,	\$1.25 per M cu.ft.
Next	250,000 cu.ft. per month,	\$1.15 per M cu.ft.
All over	500,000 cu.ft. per month,	\$1.10 per M cu.ft.

Prompt payment discount 10 cents per M cu.ft.

Minimum charge 50 cents per month.

The company proposed an alternative rate schedule as follows:

Block Meter Rate:

First	25,000 cu.ft. per month,	\$1.25 per M cu.ft.
Next	25,000 cu.ft. per month,	\$1.20 per M cu.ft.
Next	50,000 cu.ft. per month,	\$1.15 per M cu.ft.
Next	150,000 cu.ft. per month,	\$1.10 per M cu.ft.
Next	250,000 cu.ft. per month,	\$1.05 per M cu.ft.
All over	500,000 cu.ft. per month,	\$1.00 per M cu.ft.

Prompt payment discount 10 cents per M cu.ft.

Service charge 50 cents per month.

The city did not file objections to the order, nor petition for a rehearing within the thirty days after the service of the final order as provided by the rules of the Commission and by section 22 of the Public Service Commissions Law, nor did it at any time during the hearing move for a general reopening of the whole case. Its objections to the ruling of the sitting Commissioner that the hearing should be confined to the particular items of cost of production on which the petition of the company for a reopening was based were therefore not well taken. At the first hearing before Commissioner Van Namee in the city of Utica on May 28, 1920, the objections of the city to the reopening were overruled, and the hearings were confined solely to evidence showing the increased cost of production since the order of April 1, 1920.

The city further moved for a dismissal of the petition on the ground that an application was pending before the Commission on the question of reducing the required British thermal units heating value of manufactured gas, holding that the question of rates could not be intelligently settled until the Commission had decided whether the heating units required should be reduced, and if the Commission did so decide the corresponding decreased cost of production of gas should be taken into consideration, and should be deducted from the cost shown by the company.

The sitting Commissioner held that the question of decreased cost because of possible future reduction in British thermal units required by the Commission did not enter into this case and that the other factors could be determined and a rate fixed irrespective of whether the British thermal units remained as at present or were reduced, and that the Commission would not be justified in withholding a decision in this matter until the standard of heating value was settled. If and when this standard is settled and the new standard, if such is adopted, results in a decrease in the cost of pro-

ducing gas, this reduction can be adjusted hereafter in the rates allowed.

The increased cost of production claimed by the company is shown in various items which will be considered separately.

GAS OIL

Assuming as in the former opinion, and disregarding the company's claim of 3.7 gallons, 3.5 gallons of gas oil per M cu.ft. of water gas made at an average price paid by the company in 1919 of 8½ cents a gallon, shows an average cost of 30 cents per M cu.ft., and that was the figure adopted by Commissioner Fennell.

The company had a most favorable contract for 1,700,000 gallons of gas oil, 10 per cent more or less, at 6.2 cents a gallon for the year ended July 1, 1920. The company in 1918 used 2,787,000 gallons of gas oil; in 1919, 2,630,725 gallons, so that it was forced to buy outside its contract to meet its needs. During the months of March, April, and May, 1920, 50,000 gallons were purchased a month at a cost of 15 cents per gallon plus \$.0142 per gallon for freight.

Much evidence was introduced to show that the company proceeded with due diligence to procure a new supply. In March and in May, 1920, letters were written to many of the companies supplying gas oil for quotations on oil and looking to a contract for a year's supply. Many companies refused to offer any quotations because of lack of supply, embargoes, and freight restrictions. Some advised waiting until June in hopes of lower prices. The answers showed the price varied from 14 cents to 16 cents at the refinery. To this of course must be added the freight which varied as the distance from the refinery to Utica. The Commission can take judicial notice that 14 cents to 15 cents was the prevailing market price at that time and is today.

The company was apparently unable to contract with any company for the needed quantity, but finally entered into a contract with the Prudential Oil Company for 600,000 gallons

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at 14 cents plus \$.0142 freight, enough for approximately two or three months supply, deliveries to begin on July 1, 1920. This was the same company with which the company had its former contract. It may fairly be held that the company was not guilty of laches in failing to make a contract for a year's supply from July 1, 1920. It was a matter of business judgment as to whether the price after that date would be higher or lower than during the Spring, and the fact that the price was very high as compared with other years and with contracts made in other years would justify the company in not entering into a contract, but to withhold its order hoping for better prices. Nor could it be criticized for making a contract with the Prudential, with whom it had had satisfactory relations in the past, although it was shown that the monthly shipments were not always shipped on schedule time, nor in the agreed amounts. Still the Prudential did complete its contract by delivery of the total amount agreed on by July 1, 1920, the time of its termination.

The city called special attention to communications from one company which offered oil at a less price than 14 cents at the refinery, but an examination of the exhibits shows that the price offered was indeterminate and might have been more or less. It was based upon a sliding scale of cost of crude oil, and the company could not be criticized for refusing to enter into such an indefinite agreement.

If the price of crude oil should materially advance during July or August or September, the company might find itself paying more than 14 cents a gallon, the contract price fixed in the 600,000 gallon contract with the Prudential company, which was expected to care for its needs during these months. The heavier gravity of the oil offered, the distance from the refinery, the uncertainty of transportation and car shortage should also be factors considered.

The Commission will not take upon itself the burden of saying from which of several competitors a company should

have purchased its supplies, always providing the contract entered into is not unreasonable in its terms nor in price materially different from the prevailing market price of the supplies at the time of purchase.

Basing the cost, therefore, to the company of oil delivered at Utica at \$.154 and taking the same figures for the amount of oil needed to produce a gallon of gas as were accepted in Commissioner Fennell's Opinion, disregarding the fact that the company claims that it is necessary to use more oil of the present quality, it is found that at \$.154 per gallon it costs the company 53.9 cents to produce 1000 cu.ft., or an increase of 23.9 cents per M cu.ft. over the cost of production as estimated in the previous opinion.

COAL

In December, 1919, the company paid for grate coal for making gas \$8.05 a ton delivered in Utica. At the time of the hearing it was paying \$9.30, an increase of \$1.25 a ton.

The company is unable to obtain a yearly contract for grate coal, and is now receiving its coal from local dealers under a contract to pay the prevailing market price. Its needs are six cars a week. There is no reason to expect a reduction in the price of coal, and it is claimed by the company that this increase means an increase in cost per M cu.ft. of gas of \$.0225 at the holder.

Steam coal in December, 1919, cost the company \$3 net ton at the mines plus \$2.21 freight, or a total of \$5.21. At the time of the hearing its cost was \$3.75 at the mines plus \$2.21 freight, or a total of \$5.96 a ton. The company has a contract at this rate expiring May 31, 1921, subject to increases in the freight rates. However, an increase of 75 cents in this kind of coal may be taken as fixed, and this increase is reflected by an increased cost at the holder of \$.0135 per M cu.ft.

The experience of the Commission in these matters shows these figures of increased cost per M cu.ft. to be reasonable.

LABOR, UNACCOUNTED FOR GAS

No definite figures were given as to the increase in the price of labor though it was testified that the cost had increased about 20 per cent since January 1, 1920. No allowance has been made for any increased cost in production due to this item, nor is any greater allowance for unaccounted for gas made than was fixed in the former opinion.

The 8 per cent return on the valuation of the company's property at \$1,153,500 engaged in the public service in the Utica district according to the city's valuation in the former case, and based on the 1919 sales, represented a return necessary of \$.202 per M cu.ft. of gas sold.

The first five months of 1920 showed sales in the Utica district of 218,545 M cu.ft., or at the rate for the year of 524,508 M cu.ft. This would require a charge of \$.176 per M cu.ft. to obtain an 8 per cent return on the valuation above given.

It must be remembered that this valuation is at the lowest figure claimed by the city, and does not pass upon the contention of the company for a valuation of \$2,830,909, or more than 2½ times the amount on which this return per M cu.ft. is fixed.

To summarise, then,—	
Cost of gas per M cu.ft. as per Opinion of April 1, 1920.....	\$.995
Increased cost per M cu.ft. gas oil at 14 cents on July 1, 1920....	.289
Increased cost gas coal at \$1.25 per ton July 1, 1920.....	.022
Increased cost steam coal 75 cents per ton July 1, 1920.....	.014
8 per cent return on valuation proposed by city of Utica in former hearing .....	.176
Total	\$1.446

If gas oil should be figured at \$.128 per gallon as contended by the city, then the increased cost would be \$.173 per M cu.ft., and the total return would then be \$1.37 per M cu.ft.

The base rate asked for by the company in its schedule in this proceeding is \$1.40 per M cu.ft. to which may be added \$.015 per M cu.ft. for forfeited discount, minimum bills, etc., making a total return of \$1.415 which is not sufficient to produce the return to which the company is

entitled with oil at 14 cents per gallon, the price the company is actually paying, nor is it unreasonable in view of the low valuation taken were the oil, with freight charges added, costing only \$.128 a gallon. The return per M cu.ft. is still further reduced by the lower rate allowed consumers of over 25,000 M cu.ft., and it is probable that taking this into account the company's net return on the block rate schedule is not over \$1.35 per M cu.ft.

It is judged to be a better practice to allow the increase to \$1.50 per M cu.ft. with a prompt payment discount of 10 cents and a minimum charge than to change to a system containing a service charge as proposed by the alternative proposition of the company. The change would involve explanation and education among the people as to its meaning and an expense in the system of billing and bookkeeping for the company which would not be justified by the uncertain tenure of the rates allowed in this proceeding. On account of the uncertainty in present conditions and the fluctuating prices of the necessary materials used by the company, it is deemed best by the Commission not to fix the rate for a longer period than six months and until the further order of the Commission.

While the cost of production per M cu.ft. is the same for large as for small consumers, the cost of distribution and the general and commercial expenses are much smaller, and it is, therefore, equitable to allow large consumers a reduction under the base rate which affects approximately 80 per cent of the company's consumers. It is doubtful, however, if the Commission can leave the amount of such reduction to the discretion of the company, nor would it be wise to allow this to be changed at the option of the company without permission of the Commission. The request of the company in this regard must be denied and the block schedule is adopted which fixes the maximum price to consumers of various amounts. Experience has shown that a minimum charge of 50 cents is entirely reasonable.

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An order should be made permitting the company to file on five days' notice the following block meter schedule of rates based on a net price of \$1.40 per M cu.ft. effective August 10, 1920, in the Utica district for a period of six months thereafter and until the further order of the Commission:

Block Meter Rate:

First	25,000 cu.ft. per month,	\$1.50 per M cu.ft.
Next	25,000 cu.ft. per month,	\$1.40 per M cu.ft.
Next	50,000 cu.ft. per month,	\$1.30 per M cu.ft.
Next	150,000 cu.ft. per month,	\$1.25 per M cu.ft.
Next	250,000 cu.ft. per month,	\$1.15 per M cu.ft.
All over	500,000 cu.ft. per month,	\$1.10 per M cu.ft.
Prompt payment discount 10 cents per M cu.ft.		
Minimum charge 50 cents per month.		

Chairman Hill and Commissioners Irvine and Kellogg concur; Commissioner Barhite not present.

In the Matter of the Complaint of SAMUEL S. LIFSHITZ of Godeffroy, Orange county, *against* ORANGE COUNTY PUBLIC SERVICE CORPORATION, asking that its electric lines be extended and electricity furnished complainant's residence and farm building. [Case No. 7338.]

1. Residents of rural districts within reach of electric plants and in territory covered by franchises of the electrical corporation should be supplied with service if it can be done in a safe and practicable manner and without prohibitive expense.

2. Unusual installation in order to afford rural service should not be made entirely at the expense of the corporation. To do so would require special and high rates for such rural consumers, or would involve capital expenditures imposing an undue burden on urban consumers. In this case the consumers were required to contribute to the expense of installation the difference between that expense and the average cost to the corporation per consumer of distribution system, including transformers, service drops, and meters.

Decided July 29, 1920.

Appearances:

Gregg & Feuchs (by Mr. William P. Gregg), Port Jervis, attorneys for complainant.

Russell Wiggins, Middletown, attorney for respondent.

IRVINE, Commissioner:

The Orange county Public Service Corporation has an electric generating plant at Cuddebackville in Orange county with transmission lines to Port Jervis and Middletown to which communities it supplies electric service. Godeffroy is a settlement near the transmission line between Cuddebackville and Port Jervis. The complainants ask that the respondent supply them with electricity from this transmission line. The transmission line carries a current of 33,000 volts. Not far from the buildings of the applicant the company now has a 10 kw. transformer which steps down the 33,000

volt current to 110 volts, and the secondary line is carried along the same poles as the transmission line 980 feet and thence 250 feet therefrom to the home of Mr. Kornbluh whose average demand since 1920 has been 13 kw. h. per month. The applicants ask that they may be supplied from this same transformer by a similar method with a secondary leading in the opposite direction. The company contends that a new transformer would be needed, that it would have to be specially constructed, could not be obtained for many months, and that the method proposed is scientifically and economically undesirable. It would seem that these applicants should be supplied with the service if it can be done in a safe and practicable manner and without prohibitive expense. There are four applicants professing themselves to be anxious to secure the service. Another desires the service if it can be had at sufficiently low cost. The witnesses were not able to indicate very definitely their probable demand. Mr. Samuel Lifshitz states that his dwelling is wired and that he wishes current for his house and for a chicken house. He states that the most modern method of raising chickens requires electric light in the short days so that the chickens will have long hours "to scratch and eat and the result is they lay more eggs". Mr. Lifshitz also takes boarders in the Summer. His father, Oscar Lifshitz, has a six room house and takes summer boarders. Mr. Abraham Segal says that he has forty lights in his house, but he spoke with the aid of an indifferent interpreter, and his testimony is very confused, and as nearly as can be gathered he specifies only about twenty-two lights. He seems also to take summer boarders. Mr. Meyer would use lights in his store and dwelling house and, he thinks, in his barn and chicken coop. It was found necessary to have the locality inspected by an officer of the Commission who also inspected the premises of the applicants, and who reports a maximum demand including Kornbluh of 6.75 kw. The additional demand of the fifth probable consumer would probably not

overtax the 10 kw. transformer now in place. The average revenue of the company per consumer for commercial lighting is \$34 per year. In view of the seasonal character of the business of the occupants of most of the houses concerned it is hardly likely that their consumption will be as great as the average. The service therefore promises a revenue of not to exceed \$204 per annum. It more likely will not exceed \$100. To require the installation, quite expensive by any practicable method, at the expense of the company would be fair neither to the company nor to its other consumers. Perhaps service to this particular group would not require a general increase in rates, but to require service at the regular rates to all who might come upon the transmission line with installation of service at the company's expense would mean either a special and very high rate to this class of consumers or a general increase whereby consumers in Port Jervis and Middletown would be required to carry a large portion of the burden of the rural service. The problem, therefore, is to ascertain by what method the service can be rendered and what portion of the cost of installation should be borne by the applicant in order to avoid the injustice of requiring free installation.

As already stated it seems probable that the 10 kw. transformer now in place would supply Mr. Kornbluh and all of the new customers, but the company thinks a new transformer would be required. This service by transforming 33,000 volts immediately to 110 volts and with rather a long secondary carried a part of the way on the same poles that carry the high tension lines is not good practice, and the Commission does not feel warranted in directing such construction. The company, inasmuch as it has resorted to this practice in Mr. Kornbluh's case, should be permitted at its option to extend it in this instance to the new consumers. It is estimated that using the present transformer the entire cost of the installation would be \$433.40. The average cost of distribution and service systems for the company is \$44.70,

say \$45. The company should, therefore, be required to expend \$180 assuming four new consumers or \$225 should there be five. The total cost will be increased should there be five consumers by an amount about equal to the company's share of the installation so that, regardless of the number of consumers, \$253.50 should be contributed by the group desiring service.

If it should be found that an additional or larger transformer is required the cost of this transformer and its installation should also be borne by the consumers.

The company already has a 600 volt line running from its plant in Cuddebackville to a point 4700 feet from the Kornbluh transformer. It does not seem practicable to extend this line and render the service with a 600 volt current. It is, however, entirely practicable to step this current up to 2300 volts at the power house and extend the line to serve the Godeffroy customers. Engineers of the Commission estimate the cost of the extension with necessary transformers for the customers at \$1010. The estimate does not include the step-up transformer at the power plant or the replacing of the 600-110 transformers along this line by 2300-110 transformers. It would seem that it would be to the advantage of the company to transform this line in any event and that it should bear this extra expense. By this method, therefore, which seems to be the best practicable means of supplying the complainants they should be required to contribute \$830. The company submitted no estimate as to this method of construction, and both it and the complainants should have an opportunity to be heard upon the question in the event that the complainants accept the order and the company determines upon this method of service rather than the method adopted in the case of Mr. Kornbluh.

An order should be entered accordingly.

Chairman Hill and Commissioners Kellogg and Van Namee concur; Commissioner Barhite not present.

In the Matter of the Complaint of the TOWN OF WHITESTOWN, Oneida county, by its Supervisor and Superintendent of Highways *against* NEW YORK STATE RAILWAYS and UTICA, CLINTON AND BINGHAMTON RAILROAD COMPANY as to change in location of tracks in New York Mills. [Case No. 7409.]

1. Pleadings before the Commission are not governed by statute, are permitted to be informal, and should not be construed according to the strict technical rules of the courts.

2. The Commission has authority to require a street railroad company to remove its tracks from one part of a street to another when necessary to promote the security or convenience of the public.

3. In the particular circumstances of this case, as set forth in the Opinion, the Commission found that the removal of a track from the side to the center of a street would not add to public security, or sufficiently to public convenience to justify an order directing such removal.

Decided August 5, 1920.

Appearances:

Adrian S. Malsan, 223 Elizabeth street, Utica, and *James F. Hubbell*, Utica, for the complainant.

Theodore L. Cross, 74 Utica City National Bank Building, Utica, for Utica, Clinton and Binghamton Railroad Company.

Kernan & Kernan (by *F. K. Kernan* and *J. H. Gilroy*), Devereux Block, Utica, for New York State Railways.

IRVINE, Commissioner:

The Town of Whitestown asks the Commission to direct the New York State Railways to change the location of its tracks from the side to the center of Main street in the hamlet of New York Mills. The company answered alleging that the line in question was owned by the Utica, Clinton and Binghamton Railroad Company and that it should be

made a party defendant. It was made a respondent, and answered, setting up a lease to a predecessor of the New York State Railways. On the hearing the New York State Railways conceded that it was the corporation which must assume any duty that might exist in the premises. The case as to the Utica, Clinton and Binghamton Railroad Company must be dismissed.

New York Mills is a hamlet in the town of Whitestown south of the village of Yorkville and west of the city of Utica. Main street is a continuation of a street in Yorkville and runs southerly through the hamlet of New York Mills into the town of New Hartford. The line of the New York State Railways is double tracked through the center of the street in the village of Yorkville and for a very short distance in the town of Whitestown. It is then single tracked and continues in the center of the street a short distance, and then turns toward the eastern side of the street and proceeds southerly but at varying distances from the eastern boundary of the street to the New Hartford town line. It continues in the town of New Hartford about one mile. While technically a town and county highway Main street is well built up on both sides the greater part of the distance in the town of Whitestown, and has the aspect of a village street rather than of a country road. East of the tracks it is paved with macadam which is becoming ruinous, and it is proposed to lay a concrete pavement. It is for this reason that a change in location of the tracks is desired at this time.

The New York State Railways contends that the Commission is without authority to direct the change. Section 50 of the Public Service Commissions Law provides that "If in the judgment of the Commission having jurisdiction . . . any additions or changes in construction should reasonably be made thereto [tracks, etc., of any common carrier, railroad corporation or street railroad corporation] in order to promote the security or convenience of the

public or employees, or in order to secure adequate service or facilities for the transportation of passengers or property, the Commission shall, after a hearing either on its own motion or after complaint, make and serve an order directing such repairs, improvements, changes or additions to be made within a reasonable time and in a manner to be specified therein." It will be observed that such an order may be made either to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for the transportation of passengers or property. It is evident that the Legislature had more in mind than facilities for transportation, that it had also in mind the safety and convenience of the general public. Unless power is given by charter to certain municipalities, no power short of the Legislature can require a street railroad track once installed to be moved, unless the section referred to gives the Public Service Commission such authority. (*People ex rel. City of Olean against Western New York and Pennsylvania Traction Company*, 214 N. Y. 526.) We think the Legislature has delegated the power to the Commission.

The complainant contends that the pleadings admit, by failure to deny, that the change is necessary. Pleadings before the Commission are not governed by statute, are permitted to be informal, and should not be construed according to the strict technical rules of the courts. However, if the complaint and answer be treated as formal pleadings subject to technical construction, what we have is an averment in the complaint "that complainant's officers are informed by competent authority that it is necessary that said railroad tracks be placed in the center of the highway before the concrete pavement is constructed". This is met in the answer by a denial of knowledge or information sufficient to form a belief. The Commission is not required to make an order merely because competent authority has informed the complainant's officers that it is necessary to move the tracks before the concrete pavement is constructed.

This is not an averment that the track should be moved to promote the security or convenience of the public or employees. Nevertheless, it is put in issue. The only other pertinent averment of the complaint is "that complainant's officers verily believe that it is now necessary for the safety and convenience of the public that said tracks be placed in the center of the highway". This is not denied, but the belief of the complainant's officers does not meet the statutory requirement. It is the fact that the change should reasonably be made in order to promote the security or convenience of the public or employees and not the belief of a complainant to that effect that must move the Commission.

This brings us to the merits. There is no doubt that the street ought to be paved, and soon. There is evidence tending to show that it is not practicable within the space between the track as it now is and a pole line of the Utica Gas and Electric Company near the sidewalk on the west side of the street to pave a roadway 20 feet in width. This is practicable in some places, but not in others. It is practicable to move the tracks several feet farther to the east in these narrow places, and it is shown that by so moving the tracks it will be practicable to pave a space of 22 feet between the tracks and the pole line. The town desires to pave a greater width. The evidence and observations made by the sitting commissioner on the ground lead to the conclusion that a wider space than is now available should be provided, that moving the tracks at certain points toward the eastern sidewalk would permit a pavement wider than almost any state highway and wider than many city streets. It is probable that still more space could be provided on the western side by some readjustment of the poles already referred to and proper provisions for drainage to take the place of an open gutter now existing which seems to occupy some space otherwise available for traffic. The street railroad track at present is constructed of 80-pound T rails.

If it should be moved to the center of the street and the space paved it would be necessary to construct an entirely new track at an estimated expense of \$47,000. If the company should be required to pave between its rails and 2 feet outside, a further expense of over \$20,000 would be involved. Expense is a minor consideration and, if not prohibitive, a negligible factor where public safety is actually involved. The expenditure would largely be a capital expense, and it should need no argument to demonstrate that in the present condition of the electric railroads and the state of the market for their securities no considerable capital expenditure should be ordered except where strong and urgent reasons exist. We can not see that safety would be promoted by the change although in some aspects there would be greater convenience, especially in reaching premises upon the east side of the street. On this side, however, for about one-half of the distance the land is occupied by a single institution, and the abutting structures are only along the remainder of the stretch. It is contended that it will be safer for vehicular travel to have the railroad in the center of the street in order to separate the north and south bound traffic. It is also contended that this would permit paving to the width of 28 feet and that safety would be promoted by the wider pavement. As against this it may be said that on the whole both vehicular traffic and street railroad traffic are safer if entirely separated, that is, if vehicles be kept entirely off the railroad tracks and if the portion of the highway allotted to vehicles be clear of rails and moving cars. This method is frequently resorted to where conditions permit, a notable instance being in the neighboring city of Utica. Certainly there is no such preponderance of safety or convenience in midstreet construction as to warrant the Commission in ordering all street railroads into the center. No special circumstances exist here unless it be the existence of houses on the east side of the street which must be reached by vehicles across the track, and the

proximity of the cars to the sidewalk. The track must be crossed by vehicles and pedestrians in either case. The necessary crossings can and should be provided in the present location, and could and should be made as safe there as elsewhere. The street railway traffic is not heavy, and the pedestrian traffic is also light, especially on the greater part of the route along the east side. We are unable to see any appreciable menace from this source.

It is said that the company now throws the snow from its track upon the east sidewalk and leaves it there. If the track were in the center of the street the snow would probably be thrown to either side of the track and the vehicular traffic relegated as in many other places to the space cleared by the railroad for the operation of its cars. The local authorities ought to be able to compel the company not to obstruct the sidewalk with snow. If such a practice is resorted to the Commission's aid can be invoked to abate the nuisance. The matter of drainage was also suggested. The present arrangements seem on a cursory examination to be inadequate. It is to be presumed that in the important improvement under contemplation the matter of drainage will receive attention, and if in order to accomplish proper drainage any duty to aid in that behalf is devolved upon the railroad company it should willingly perform it, and if it is not willing to do so performance may be compelled.

The town's plans for the pavement are not yet matured. It is impossible in the present state of the project to make any affirmative order which is very specific. The company should, however, be directed to move its tracks where necessary in order to afford a clear space available for paving of at least 22 feet. If further directions become necessary they can be applied for.

All concur.

In the Matter of the Petition of the STATE COMMISSIONER OF HIGHWAYS under section 91 of the Railroad Law for an alteration of the crossing at grade of County Highway No. 53 and the Putnam division of the New York Central Railroad in the towns of Ossining and Mount Pleasant, Westchester county. [Case No. 6587.]

Decided July 15, 1920.

Appearances at the hearing December 5, 1918:

B. S. Voorhees, Engineer of Grade Crossings, New York Central Railroad Company.

F. A. Hermans, Engineer of Grade Crossings, State Highway Department.

E. J. Howe, Resident Engineer, State Highway Department.

A. W. Hendrickson, for the Town of Ossining.

Charles McDonald, jr., County Superintendent of Highways of Westchester county.

Appearances at the hearing July 8, 1920:

J. O. Donnelly, Grade Crossing Engineer, State Highway Commission.

G. A. Noren, Grade Crossing Engineer, The New York Central Railroad Company.

VAN NAMEE, Commissioner:

On September 16, 1918, the State Commission of Highways filed a petition with the Public Service Commission alleging that public safety required an alteration in the manner in which a road known as County Highway No. 53 crosses the tracks of the Putnam division of The New York Central Railroad Company near the boundary line of the towns of Mount Pleasant and Ossining, Westchester county, and petitioned that the Commission determine under the provisions of section 91 of the Railroad Law that such crossing be altered.

It was further alleged by the Highway Commission that such road was an improved county highway as described by chapter 30 of the laws of 1909.

Notice to property owners affected was given and publication of the time set for a hearing on the petition was made according to law. The hearing was held at the office of the Commission on the 5th day of December, 1918, at which time it appeared from the evidence that the road in question crossed the line of the Putnam division of The New York Central Railroad Company at grade, and proceeding from the north to the south before crossing the road, was intersected by a road known as the Long Hill Road. The road continues across the railroad at grade and also across the Pocantico river.

The effect of the granting of the application by the Commission would be to locate the grade crossing about 75 to 100 feet northerly of its then location and would necessitate the building of a new bridge about 20 feet long across the Pocantico river but outside the right of way of the Railroad Company.

The effect of the whole alteration would serve to straighten the alignment of the highway but would not eliminate any grade crossing, as the new crossing would be at grade.

The Railroad Company objected to the change on the ground that it did not eliminate any grade crossing and that the crossing at this acute angle would be more dangerous than the right angle crossing which would be eliminated. It is also contended that the new alignment, being on a tangent, would in fact result in higher speed being maintained by automobiles through this section of the road, and this in itself would make the crossing more dangerous to the public. The Railroad pointed out that it was not benefited by having the crossing changed as no grade crossing was eliminated and considerable expense would be incurred by it in changing the planking, cattle guards, bell signals, caution signs, telegraph wires, and telegraph poles. It,

however, agreed to withdraw its objection if the work could be done without any expense to it, and the hearing was adjourned to give time for the preparation of plans to meet the objections raised at the hearing and for the consideration of the proposal of the Railroad.

At the hearing, the testimony of the engineer of grade crossings for the Highway Commission and the resident engineer of the Highway Commission both show an understanding on the part of that commission that part of the work was necessarily to be done by the Railroad Company, and the willingness of the Highway Commission to assume the expense and to waive the provisions of the Railroad Law providing that one-half of the expense of a change of this character be borne by the Railroad Company. For instance, on page 11 of the minutes the engineer for the Highway Commission says:

The Highway Department is willing to pay for the planking of the new crossing and it is our wish that the planking be made 24 feet wide and at right angles to the center line of the highway and that meets Mr. McDonald's wishes.

Mr. McDonald was the county superintendent of highways of Westchester county.

The State Highway Commission constructed the bridge necessary to permit the change, and on October 9, 1919, an order was made by this Commission setting forth in detail how the work of this alteration was to be accomplished along plans prepared by the Railroad Company. The last paragraph of the order is as follows:

It is understood and this order is made with the express condition that no financial liability or obligation whatsoever shall attach to or fall upon the New York Central Railroad on account of the performance of the work above authorized, and that no part of the cost of such work or of any expenses incidental thereto shall be charged to or be payable or paid out of any moneys which may have been or may be appropriated by the Legislature of the State of New York for the purpose either of the elimination of grade crossings or of the reconstruction of existing crossings either at grade or otherwise.

Upon this order the Railroad Company's work has been completed, and the road is now open for travel. The Railroad Company did the work necessary to be done by it along the line of its right of way, such as the re-location of the planking at the crossing and the removal and re-location of the cattle guards, bell signal, and the warning signs, telegraph poles and wires, and submitted bills to the Highway Commission for the amount of expense incurred by it.

The first bill was for \$95.17. This bill having been objected to by the Highway Commission an inquiry was made by this Commission. On March 9, 1920, the Highway Commission replied saying that the bill could not be paid by it as it was contrary to the provisions of the Railroad Law which provided that a certain proportion of these costs should be paid by the Railroad Company. The letter also raised the point that the order itself prohibited the use of any funds of the Highway Commission being devoted to the payment of any costs which were incurred under the order. Subsequently the Railroad Company transmitted to the Highway Commission a bill, including the first bill of \$95.17, for the total of all the work done by it in connection with this alteration amounting to \$706.02.

On June 9, 1920, the Highway Commission again wrote to this Commission refusing payment of the amount claimed by the Railroad Company and reiterating its position taken in its letter of March 9th.

A hearing was therefore called for final accounting which was held before me on July 8, 1920, at the office of the Commission in Albany. No question was raised by the Highway Commission as to the correctness or reasonableness of the various items in the bill rendered by the Railroad Company, but their decision remained, as already stated, that the order of October 9, 1919, should not have been made as it was contrary to the provisions of law providing for the payment of work of this character, and that even if it

were not so contrary, by its provision it prohibited the Highway Commission from using any of its funds.

I consider the position of the Highway Commission untenable. The order states, and the evidence at the first hearing clearly shows, that there was an understanding and agreement between the representatives of the Highway Commission and the Railroad Company that the Railroad Company was to be relieved of all liability in this matter, in return for which it agreed to withdraw any opposition to a project which the Highway Commission itself initiated and which the Railroad Company believed would increase rather than decrease the safety of travel at this particular grade crossing. The Highway Commission accepted the order and made no objection to it from October 9, 1919, until the Spring of 1920 when after all the work had been completed and the bill transmitted by the Railroad Company for the expenses incurred by it the objections already mentioned were brought forward.

There is no question but what the Highway Commission can waive the provisions of the law and enter into an agreement providing for payment by it of certain percentages in work of this kind. It has been done in other cases, and no objection has ever before been raised.

The phrase in the order: "No part of such work or of any expenses incidental thereto shall be charged to or be payable or paid out of any moneys which may have been or may be appropriated by the Legislature of the State of New York for the purpose either of the elimination of grade crossings or the reconstruction of existing crossings either at grade or otherwise" was inserted and it clearly shows from its context that the intention was to have it apply only to moneys appropriated for the elimination or alteration of grade crossings to be expended under the direction of the Public Service Commission.

After due consideration, the reading of all the evidence and correspondence in connection with this matter, and a

study of the plans, it must be held that the Highway Commission made an agreement by which the Railroad Company was to be relieved of any liability in connection with this matter, and the order of the Commission clearly so states. An order should therefore be entered to the effect that the Highway Commission pay to the Railroad Company the sum of \$706.02 in full and complete settlement of the expense incurred by the Railroad Company in connection with the work done in this matter. The Highway Commission should have a reasonable time for examination of the items of the bill rendered by the Railroad Company and should not be liable for interest on this account if the sum is paid on or before the 1st day of September 1920.

Chairman Hill and Commissioners Irvine, Barhite, and Kellogg concur.

In the Matter of the Complaint of ARMOUR VILLA PARK ASSOCIATION of Yonkers *against* THE WESTCHESTER ELECTRIC RAILROAD COMPANY and THE YONKERS RAILROAD COMPANY, asking that a five cent fare be established between Central avenue in the city of Yonkers and Waverly Square in the incorporated village of Tuckahoe. [Case No. 7571.]

Fare zones should be so arranged as to avoid unnecessary discrimination.

Where by agreements with local municipal authorities fare zone boundaries have been fixed by a street surface railroad company at the municipal boundaries, such fare zones will be changed by this Commission, notwithstanding such agreements, if necessary to prevent the collection of excessive fares from a certain class of passengers, and the change will result in an increase of revenue on account of the local conditions.

Decided August 17, 1920.

Appearances:

John H. Ryan, 29 Cassillis avenue, Yonkers, for complainants.

Woodson R. Oglesby, Mohican Park, Yonkers, personally as a complainant.

Alfred T. Davidson, 2396 Third avenue, New York city, for the respondents.

KELLOGG, Commissioner:

In the northeasterly portion of the city of Yonkers there have been several real estate developments, resulting in the construction of residences and the location of a population of upward of a thousand.

These locations took the names of Armour Villa Park, Mohican Heights, and Colonial Heights. They are over 4 miles distant from the center of the city of Yonkers, and

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are at least 2 miles from the compactly built up portion of that city. They form in a way a community by themselves. The inhabitants are largely commuters, at least half of whom use the trains of the Harlem division of the New York Central railroad, boarding and alighting from such trains at the Tuckahoe and Bronxville stations.

The distance from Cassillis avenue, which is about the center of these communities, to the easterly line of the city of Yonkers is 800 feet, and from this boundary line to the Tuckahoe station is 1800 feet.

One of the lines of The Yonkers Railroad Company, extending northerly from Getty Square, the commercial center in the city of Yonkers, passing by this point on the Tuckahoe road continues to the Tuckahoe station. This line is the natural carrier for passengers in these localities desiring to go to the Tuckahoe station, and should serve that population for a reasonable rate of fare.

Earlier in the present year, in order to produce needed additional revenue, certain zones were established on the lines of The Yonkers Railroad Company and The Westchester Electric Railroad Company, affiliated corporations, based upon the principle that the municipal boundaries should serve also as boundaries of zones.

An important modification of this provision was established in the southerly part of Yonkers where in a very substantial territory south of McLean avenue a neutral zone was established, passengers to and from which would be carried without additional fares into adjoining zones.

By reason of the establishment of a zonal boundary in accordance with this general plan at the easterly line of Yonkers, which is also the westerly line of the town of Eastchester, citizens in the communities affected desiring to go to Tuckahoe, as many of them do daily in commuting to New York city and for other purposes, have to pay two fares for transportation over this distance of 2600 feet, or less than half a mile, on the average.

It is urged that these people should be permitted to travel this distance for a single fare, and it is suggested that if the fare limitations were placed as far westerly as Cross street, about 400 feet from Cassillis avenue, this entire population would be accommodated for this single fare, and the maximum ride would amount only to about 3000 feet. It is not claimed that this is an unreasonably long ride for a five cent fare. So far as distance is concerned this is manifestly a very reasonable request. The Railroad Company, however, strenuously opposes upon other grounds.

It is contended that because people in this same locality can for five cents travel anywhere in the city of Yonkers, obtaining a direct ride of 7 miles, and perhaps more by judicious use of transfers, those desiring to go a short distance in the other direction should be willing to pay twice as much in order to equalize matters. This argument is unsound. The only conclusion that it can lead to is that this system of charging is "unjust and discriminatory," under the meaning of section 49 of the Public Service Commissions Law. It can not be seriously urged that certain people should be charged unduly high fares in order to compensate the Railroad Company for the transportation of others at an unduly low rate of fare. All the fares should be regulated on a uniform basis.

Of course in trolley transportation under the American system the profit on short haul riders in a measure compensates for the losses on those carried longer distances, where there is but a single rate of fare. But where zones are established, the very purpose of their establishment and the object of permitting additional charges for passengers traveling longer distances, is to cast the burden of the cost of the transportation upon the passengers in some proportion to the length of their trip. Certainly the establishment of a zone unduly short in order to make up for one unduly long is entirely inconsistent with the whole theory of zonal charges.

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It is further urged that by agreements with the different municipalities the municipal boundaries were taken by all to be the proper boundaries for the zones, and that any departure from this rule would give an advantage to one locality not enjoyed by others, and would be in the nature of a breach of faith and violation of the understanding between the Railroad Company and each of the municipalities when the present zones were agreed to.

The answer to this is that the rates of fare are not properly fixed under the law, by contract between the municipalities themselves and the Railroad Company, except as such contracts are subject to revision by this Commission. This is certainly the law since the late decisions of the Court of Appeals as to all franchises granted since the Public Service Commissions Law went into effect July 1, 1907. It is the duty of this Commission to remove all unjust discrimination, and agreements by parties can neither diminish our power nor alter our duty in the premises.

It is further urged that other communities on this railroad system have an equal right to consideration in this regard, and an equal claim to be carried over its lines in other municipalities without the payment of additional fare. If this be so, and the conditions of other situations be similar to those disclosed in this proceeding, reasons exist for extending to other localities similar privileges.

If the granting of the application would result in any impairment of revenue to the Railroad Company, that fact should be given very serious consideration before action reaching such a result could properly be taken.

It is the undisputed evidence in the case, however, and quite apparent from a consideration of the situation that the revenues will be increased and not diminished by the establishment of a neutral zone, including the localities affected, upon which the passengers may be carried to and from the Tuckahoe station for a single fare.

As it is now they have to pay ten cents or walk the dis-

tance to the city boundary, an average distance of 800 feet, and having walked this far it is quite easy and natural to continue the journey the balance of the distance to the station, 1800 feet, especially in clear weather. The result is, as appears from the record, that a substantial number of passengers who would, and under previously existing conditions did, pay a five cent fare, now walk and pay nothing rather than to pay the ten cent fare for transportation over this distance of about half a mile. The establishment of an overlapping zone covering passengers between this locality and the Tuckahoe station would therefore augment and not decrease the revenues of the Company.

It is quite apparent that the opposition taken by the Railroad to this petition is due to its desire to keep faith with the various municipalities at the time of the establishment of the zones. For this it is to be commended.

Undoubtedly also there is some fear on its part that the departure from that policy may open the door to other applications, which might impair its revenues. If such cases arise, they can be handled properly under the circumstances involved in each particular case.

Suffice it to say that here is a substantial population desiring frequent transportation by the carrier to a point about half a mile distant. It should be served at a reasonable rate. One five cent fare is amply sufficient, especially in view of the fact that the patronage resulting from such reduced charge will add to rather than decrease the revenues of the Company.

An order should therefore be entered providing that passengers shall be carried between Cross street in the city of Yonkers and Tuckahoe railroad station in the town of Eastchester for a single fare of five cents.

All concur.

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In the Matter of the Complaint under sections 71 and 72, Public Service Commissions Law, of the TOWN BOARD OF THE TOWN OF CANTON, St. Lawrence county, *against* ST. LAWRENCE TRANSMISSION COMPANY as to prices proposed to be charged the public for electricity in said town. [Case No. 7488.]

When an electric transmission company has bound itself by contract with a municipality for street lighting the Commission has no power to alter the terms of the contract. If such contract results in a loss to the company, individual consumers should not be called upon to pay higher rates to offset the loss.

Minimum charge and service charge considered: Under the minimum charge the consumer pays for a certain amount of current whether he uses it or not. Under the service charge he pays a flat amount each month and a fixed rate per kw. h. for the exact amount of current he uses.

A service charge is fairer and more equitable than a minimum charge because under the minimum charge the less current a consumer uses the more he pays for having the privilege of using the service whenever he requires it. Under a service charge the cost of having the service available for use is borne equally by all consumers and not entirely by small consumers as is the result in a minimum charge.

Held that under the circumstances of this case, a service charge of 90 cents per month is more fair and reasonable to both the company and the consumer than a minimum charge of \$2.50 per month.

Decided August 17, 1920.

Appearances:

C. G. Chaney, Supervisor Town of Canton, Canton, St. Lawrence county, and *F. D. Sanford*, Morley, for the complainants.

Neile F. Towner, 126 State street, Albany, attorney, and *F. A. Stoughton*, Potsdam, President, St. Lawrence Transmission Company, for the respondent.

VAN NAMEE, Commissioner:

The St. Lawrence Transmission Company is an electrical corporation, and manufactures, transmits, and sells electric power. Its hydro-electric plant is at Colton, St. Lawrence county, and its operations are confined solely to that county.

On the 6th day of August, 1917, the company obtained from the Town Board of the Town of Canton a franchise to supply electric current to private persons in a lighting district known as Morley, an unincorporated village of approximately 250 population. The franchise also contained a contract to light the highways of such lighting district at a fixed rate per lamp for a period of 10 years. The company constructed a line to Morley, which is about $4\frac{1}{2}$ miles from its main transmission line, and on about February 1, 1918, commenced to deliver electric current to consumers in the district and to the street lighting system.

The rate for current for commercial consumers as originally filed provided for a minimum charge of \$1 per month and a charge for current of 11 cents per kw.h. for the first 50 kw.h. used per month, with lower rates for larger consumption and a 10 per cent discount on all bills paid within 10 days from their date. These prices were agreed upon at the original meeting of the citizens of Morley, and the company accepted this rate with a guaranty of 30 meters. It was agreed that the prices originally fixed were the same as prices charged by the company for electricity furnished under similar conditions to other communities and fulfilled the terms of the franchise by which the company agreed to furnish electricity "at the same prices respectively for which it is furnished by said company at other places of similar size and served under substantially the same conditions".

Within a reasonable time the 30 meters were installed, and they had increased to 41 at the time of the hearing. The company receives for the street lighting \$314.29 a year under a definite rate per lamp.

The franchise agreement was to remain in force for 10 years from the date of signature, August 16, 1917. So here we have a situation in which the price for street lighting was fixed but in which the rates to private consumers were subject to adjustment as prices varied in similar places served under substantially the same conditions by the company.

The rate for private consumers remained in force until May 1, 1920, when a new rate, filed March 26, 1920, went into effect. The only change in this rate was that the minimum charge was increased from \$1 to \$2.50 per month. The lighting contract with the lighting district is unaffected by this raise. To this rate the town board filed a complaint. The company interposed an answer, denying that the increase in rate was unwarranted and discriminatory, and alleging that the proposed rate was fair, reasonable, and just, and would not afford to the company more than a fair and reasonable return upon the value of its property invested in the public service in the lighting district.

The hearing was held by Commissioner Van Namee at Canton, St. Lawrence county, on the 19th day of June, 1920. Both the town and the company were represented. Witnesses were examined and much testimony taken. Briefs were later submitted by the interested parties. The facts being set forth, we may now consider the questions involved.

The company having bound itself by the contract for street lighting, the question of adequate return on the street lighting is not involved. The Commission has held it has no power to alter such a contract. The company must live up to its agreement; nor is it just that any weight be given to whether such contract is profitable or unprofitable to the company. If such contract results in a loss to the company, the individual consumers should not be called upon to pay higher rates to offset the loss.

The situation of Morley, $4\frac{1}{2}$ miles off the main transmission line and from 15 to 17 miles from the operating bases of the company, with no power consumers and only 41 individual consumers, is dissimilar to any other place served by the company though the rates charged are the same: 10 cents net per kw.h. Lisbon, an example of a similar place mentioned in the brief for the town, is hardly a fair comparison. Lisbon is on the railroad. It has about double the number of consumers including 7 power consumers with

99 hp. installed. In 1919 the kw.h. sold in Lisbon were 87,136 as against 9006 kw.h. sold in the Morley district. However, no other locality served by the St. Lawrence Transmission Company has a minimum charge of \$2.50 now proposed by the company, and the Commission is not inclined to allow such a charge, especially in small communities like Morley where many of the consumers have not been using in any one month the minimum amount of current to which they are entitled under the old schedule. It does not seem a reasonable procedure to force the consumer to use an increased amount of current, much of which might be absolutely wasted, in order to get the maximum value for their money, and this in effect is what the imposition of a high minimum charge does. A \$2.50 minimum means that in a year each consumer is entitled to receive a minimum of 300 kw.h.

During the year 1919, of the 41 consumers in Morley but 4 exceeded that minimum and 24 used less than one-half that minimum. To allow the proposed rate is to double the bills of 75 per cent of the consumers.

On the other hand, the company is entitled to more revenue than it has been receiving. The solution seems to be a service charge and the payment by each consumer for the actual amount of current used. A minimum charge may be defined as a charge which, if properly computed, is made up of a service charge plus a sum sufficient to pay for the average quantity of electricity used by the consumers affected. A service charge, or as it is sometimes called, consumer cost, is the expense incurred by a company in being ready to give service irrespective of what a consumer uses.

Under the minimum charge the consumer pays for a certain amount of current whether he uses it or not. Under the service charge he pays a flat amount each month and a fixed rate per kw.h. for the exact amount of current he uses.

A service charge is fairer and more equitable than a minimum charge because under the minimum charge the less cur-

rent a consumer uses the more he pays for having the privilege of using the service whenever he requires it. Under a service charge the cost of having the service available for use is borne equally by all consumers and not entirely by the small consumers as is the result in a minimum charge.

In the schedule annexed, an analysis has been prepared of the company's business in Morley and its costs, and an attempt is made to distribute all costs to their proper sources and to analyze them as between the different elements of service or consumer cost, as defined above: demand cost, which means the expense involved by reason of the rate at which the current is used under maximum demand; energy cost, which means the cost of the current at the main transmission line, in this case $1\frac{1}{2}$ cents per kw.h., the same rate charged by this company to communities using many times the consumption of Morley. The company's figures, as shown in the exhibits, have been utilized wherever possible.

Schedule I shows the kilowatt-hours sold in 1919 and the estimate for 1920. There was evidence to show that the number of customers could be increased by 5 or 6, but when the company would begin to derive revenue from these prospective customers is speculative. Experience however has shown an increase in individual consumption yearly; in this case approximately 10 per cent is taken, with the consumption for municipal lighting remaining the same.

Schedule II shows the resultant general data which has been used in subsequent calculations. The company's contention of an efficiency factor of 67 per cent appears reasonable and has been accepted. This would allow for a lost or unaccounted for current of approximately 33 per cent when referred to actual sales. This means that the amount actually sold the consumers is but two-thirds the amount of current furnished from the main transmission line. This seems high, but it is reasonable and probable when it is considered that the energy is measured on the individual meters after the losses of two sets of transformers are deducted.

Schedule III shows the actual operating expenses for 1919 with the estimated expenses for 1920. In view of the high cost of materials and general conditions, the company's contention that the distribution expense for 1919 should be increased for 1920 appears reasonable, and the exhibit figures have been accepted.

Schedules IV and V show the distribution and allocation of the operating expenses as between the street lighting and the commercial lighting.

Schedule VI shows the calculations of fixed charges. The investment of the company is taken at \$6475.21, and includes nothing of an intangible nature. No item of charge has been made for salaries of general officers, engineers, or managers; nor any charge for bookkeeping, employers' liability or other insurance; nor any overhead expense properly chargeable to cost of construction of the system. The figures are reasonable. The company is entitled to a reasonable return on the amount of capital invested in the public service in the district.

For the purpose of these calculations a return on investment has been taken at 8 per cent without any intent to determine this as the proper figure and for any other per cent desired the calculations can be modified accordingly. Depreciation is taken at the rates applied by the Commission to other companies of similar nature. The schedule shows fixed charges of \$739.31 per year.

Schedule VII shows the distribution of these fixed charges to groups, while

Schedule VIII shows the distribution of the fixed charges as between street lighting and commercial lighting.

Schedules IX and X show the summary of costs as between street lighting and commercial lighting, with

Schedule XI giving the grand cost summary.

By this it is seen that the company is entitled to a return for street lighting of \$581.88. It is actually receiving \$314.29, or a loss of \$267.59. The summary shows that the

company is entitled to a return on its commercial lighting of \$1102.61. During 1919 the revenue from commercial customers was \$675.35. The company is entitled to an increased rate which will meet this deficiency.

Under Schedule XII is worked out the return to the company under a 90 cent service charge per month and a 10 cent per kw.h. charge for current, which shows a probable revenue under these rates of \$1115.80.

The town in its brief agrees to a minimum charge of \$1.50, but it is believed that the rates proposed in this schedule are more fair and equitable both to the company and to the individual consumers, as by them the company will obtain the needed increase in its revenues for commercial lighting and each individual consumer will pay for exactly the amount of current he uses.

If after a year's experience actual results show this schedule to work inequitably in practice, a revision may be had, and to that end the order entered in this case should be to fix the rates for one year only and until changed by further order of the Commission.

Even in the new schedule here provided for, the company will fall over \$250 short of obtaining a fair return on its investment if the tables here presented are correct. Neither this community nor any other can expect to long receive service at less than cost, and if the company has entered into a contract which unforeseen events have rendered unprofitable, and the community refuses an adjustment and demands that the company abide by the letter of the bond and stand the loss, it must expect at the termination of the unprofitable contract either a refusal of further service or a demand for what it will consider exorbitant rates. Absence of a spirit of compromise and coöperation may result in a return to the days of tallow dips and kerosene lamps.

The company should make every effort during the coming year to increase the number of its customers, and to that

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end it is in the interest of the consumers to coöperate with the company's efforts along this line.

An order should therefore be made, effective September 1st, on 10 days' notice fixing a rate for individual consumers of 90 cents per month service charge plus 11 cents a kw.h. for all current used, subject to a discount of 1 cent per kw.h. for payment within ten days after rendition of the bill.

All concur.

SCHEDULE I Kilowatt-hours Sold

	1919	Estimate 1920
Municipal street lighting.....	2,880	2,880
Commercial lighting.....	6,126	6,728
	9,006	

SCHEDULE II Data Used

	Number of consumers	Kw. demand	67 per cent efficiency factor	
			Kilowatt-hours	
			Bought for	Sold to
Municipal street lighting.....	1	.8	4,300	2,880
Commercial lighting.....	41	.....	10,000	6,728

SCHEDULE III Operating Expenses

	1919	Estimate 1920
Kilowatt hours bought.....	13,440	14,300
Electric energy.....	\$201.00	\$214.00
Total distribution.....	68.20	240.85
Total utilisation.....	169.28	169.28
Total commercial.....	192.18	192.18
Canvassing and soliciting.....	14.25	14.25
Taxes.....	111.39	114.62
	\$756.90	\$945.18

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SCHEDULE IV

Distribution of Operating Expenses to Group

	Total	Consumer	Demand	Energy
Energy.....	\$214.00			\$214.00
Distribution.....	240.85	\$240.85		
Utilisation.....	169.28	169.28		
Commercial.....	206.43	206.43		
Taxes.....	114.62	57.31	\$57.31	
	\$945.18	\$673.87	\$57.31	\$214.00

SCHEDULE V

Allocation of Operating Expenses to Classes

Consumer costs	Total	Street lighting	Commercial lighting
Distribution.....	\$240.85	\$60.21	\$180.64
Utilisation.....	169.28	169.28	
Commercial.....	206.43	20.64	185.79
Taxes (\$)	57.31	14.13	43.18
Consumer.....	\$673.87	\$264.26	\$409.61
Demand (‡ taxes).....	57.31	28.65	28.66
Energy.....	214.00	64.00	150.00
	\$945.18	\$356.91	\$588.27

SCHEDULE VI

Calculation of Fixed Charges

	Investment	Return, per cent	Depreciation, per cent	Total per cent	Fixed charges
Land.....	\$58.84	8	.....	8	\$4.70
Sub-station.....	992.25	8	4	12	107.00
Poles and fixtures, transmission.....	964.89	8	4	12	115.50
Poles and fixtures, distribution.....	894.68	8	4	12	107.20
Transmission system.....	871.24	8	1.5	9.5	82.50
Distribution system.....	634.09	8	2	10	63.41
Transformers.....	802.56	8	4	12	96.10
Services.....	49.81	8	4	12	6.00
Meters and installation.....	282.09	8	4	12	33.80
Municipal street lighting.....	820.00	8	4	12	98.50
Miscellaneous construction expenses.....	204.76	8	4	12	24.60
	\$6,475.21	\$739.31

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SCHEDULE VII Distribution of Fixed Charges to Groups

	Total	Consumer	Cost group demand	Energy
Land.....	\$4.70	.....	\$4.70	.....
Sub-station.....	107.00	.....	107.00	.....
Poles and fixtures, transmission.....	115.50	.....	115.50	.....
Poles and fixtures, distribution.....	107.20	\$107.20	.....	.....
Transmission system.....	82.50	.....	82.50	.....
Distribution system.....	63.41	63.41	.....	.....
Transformers.....	96.10	96.10	.....	.....
Services.....	6.00	6.00	.....	.....
Meters and installation.....	33.80	33.80	.....	.....
Municipal street lighting.....	98.50	98.50	.....	.....
Miscellaneous construction expenses.....	24.60	12.30	12.30	.....
	\$739.31	\$417.31	\$322.00	.....

SCHEDULE VIII Allocation of Fixed Charges to Classes

	Total	Street lighting	Commercial lighting
<i>Consumers' Cost</i>			
Poles and fixtures, distribution.....	\$107.20	\$26.80	\$80.40
Distribution system.....	63.41	.....	63.41
Transformers.....	96.10	.....	96.10
Services.....	6.00	.....	6.00
Meters.....	33.80	.....	33.80
Municipal street lighting.....	98.50	98.50	.....
Miscellaneous construction.....	12.30	3.07	9.23
Consumers' cost.....	\$417.31	\$128.37	\$288.94
Demand.....	322.00	96.60	225.40
Energy.....	.....	.....	.....
	\$739.31	\$224.97	\$514.34

SCHEDULE IX Summary Costs

	Total	Operating expenses	Fixed charges
Street lighting.....	\$581.88	\$356.91	\$224.97
Commercial lighting.....	1,102.61	588.27	514.34

SCHEDULE X
Summaries by Classes
Street Lighting

	Total	Consumer	Demand	Energy
Operating expenses.....	\$358.91	\$264.26	\$28.65	\$64.00
Fixed charges.....	224.97	128.37	96.60	.....
	\$581.88	\$392.63	\$125.25	\$64.00

<i>Commercial Lighting</i>				
Operating expenses.....	\$588.27	\$409.61	\$28.66	\$150.00
Fixed charges.....	514.34	288.94	225.40	.....
	\$1,102.61	\$698.55	\$254.06	\$150.00

SCHEDULE XI
Grand Cost Summary

	Total	Consumer	Demand	Energy
Street lighting.....	\$581.88	\$392.63	\$125.25	\$64.00
Commercial lighting.....	1,102.61	698.55	254.06	150.00
	\$1,684.49	\$1,091.18	\$379.31	\$214.00

SCHEDULE XII
Possible Rate
Commercial Lighting

Number of consumers.....	41
Kilowatt-hours used.....	6728
Revenue necessary.....	\$1102.61 per year
Demand and service charge.....	90 cents per month
Current and energy charge.....	10 cents per kw.h.
41 x \$10.80.....	\$443.00
6728 x \$.10.....	672.80
	\$1,115.80

In the Matter of the Application of Steam Railroad Carriers in the State of New York for permission to increase freight rates and charges on less than statutory notice; for relief from the provisions of section 36 of the Public Service Commissions Law of the State of New York as amended June 9, 1917, with respect to freight rates and charges. [Case No. 7693.]

1. The Interstate Commerce Commission granted to all steam railroads within the Eastern Group authority to make effective on short notice increases in freight rates amounting to 40 per cent of existing rates, except as to milk, cream, and articles heretofore taking the same rates. Application was made to this Commission by the steam railroads subject to its jurisdiction for permission to file effective on short notice similar tariffs relating to intrastate rates. The proceedings before the Interstate Commerce Commission in evidence in this case showing that the Railroads of the Eastern Group are entitled to a substantial increase in rates, and that the railroads within this State are probably entitled to like increases, and the petitioners stipulating that any rate or rates may be suspended at any time within thirty days after the filing of the tariffs in the same manner as if they had not yet become effective, the Commission granted permission to file such tariffs effective concurrently with the new interstate tariffs, being moved thereto by a consideration of the disturbance in railroad and all other business if the general interstate and intrastate freight structures should even for a time be widely different.

2. In granting the permission the Commission indicated neither approval nor disapproval of the rates, and permitted their institution subject to complaint, investigation, and suspension under the law and the stipulation.

3. An increase of 20 per cent in the rate on milk, cream, and certain similar commodities was asked. These commodities were treated by the Interstate Commerce Commission in connection with passenger rates. This Commission excepted the rates on these commodities from the operation of the short notice permission and left them to be dealt with in connection with passenger rates.

Decided August 19, 1920.

Appearances:

Francis W. Brown, 53 Lancaster street, Albany, freight rate clerk of the New York State Highway Commission.

M. Maldwin Fertig, Assistant Corporation Counsel, City of New York, Municipal Building, New York city.

John J. McManus, Assistant Corporation Counsel, City of Albany, 13 North Pearl street, Albany.

Frank E. Williamson, 414 Chamber of Commerce, Buffalo, for the Buffalo Chamber of Commerce.

J. G. Duffy, Utica, for the Utica Chamber of Commerce.

George T. Russell, Vice-president of the Traffic Club, Inc., Troy.

L. E. Schlechter, 200 Fifth avenue, New York city, attorney for the National Council of Traveling Salesmen's Associations and subsidiary organizations.

Frank E. Grace, traffic secretary, Brooklyn Chamber of Commerce, Brooklyn.

Ernest J. Tarof, chairman of the transportation committee of the New York Board of Trade and Transportation; and traffic manager of the Brunswick-Balke-Collender Company of New York, 29 West 32nd street, New York.

P. W. Moore, manager of traffic and industrial bureaus of the Chamber of Commerce of the Borough of Queens, New York city, and secretary of the Shippers' Conference Committee of Greater New York.

James C. Lincoln, 233 Broadway New York city, representing the Merchants Association of New York.

J. D. Negus, 1190 Broadway, New York city.

Martin S. Decker, 180 Washington avenue, Albany, representing the Remington Paper and Power Company of Watertown.

S. R. Moyer, Scranton, Penna., for the International Salt Company of New York.

E. D. Conklin, Richfield Springs, for the Southern New York Power and Railway Corporation.

W. L. Sporborg, 531 Union Building, Syracuse, for the Rock-Cut Stone Company, and New York Crushed Stone Association.

C. C. Paulding, Grand Central Terminal, New York city, with a committee.

G. H. Ingalls, Vice-president, New York Central Lines; *W. S. Kallman*, commerce assistant to the Vice-president; and *L. F. Vosburgh*, traffic manager.

J. A. Middleton, Vice-president, Lehigh Valley Railroad Company; and *H. C. Hamilton*, general freight agent.

E. P. Bates, Broad Street station, Philadelphia, Penna., assistant freight traffic manager, The Pennsylvania Railroad Company.

Donald Wilson, 302 Pennsylvania station, New York city, general freight agent, Long Island Railroad Company.

William J. Kennedy, West New Brighton, representing the Staten Island Rapid Transit Railway Company.

H. E. Huntington, general passenger agent, Buffalo, Rochester and Pittsburgh Railway Company; *R. W. Davis*, freight traffic manager; and *James Main*, counsel, 1015 Insurance Building, Rochester.

C. L. Chapman, general freight agent, Erie Railroad Company; and *Thomas C. Powell*, vice-president of traffic.

Daniel Willard, President of the Baltimore and Ohio Railroad Company, Baltimore, Md., and also representing carriers in the Eastern Group generally; and *George M. Shriver*, Baltimore, Md., attorney representing eastern roads and the Baltimore and Ohio Railroad Company.

Frederick L. Lovelace, Niagara Falls, for the Niagara Junction Railway Company.

Frank Burton, Gloversville, attorney for Fonda, Johnstown and Gloversville Railroad Company.

H. C. Hamilton, general freight agent of the Lehigh Valley Railroad Company, in behalf of the Buffalo Creek Railroad.

G. A. Blackmon, Lowville, for The Lowville and Beaver River Railroad Company.

William Humphrey, Dansville, for the Dansville and Mount Morris Railroad Company (A. S. Murray, jr., Receiver).

W. J. Mullin, general traffic manager, The Delaware and Hudson Company.

F. P. Gutelius, Vice-president, The Delaware and Hudson Company.

R. Van Ummerson, freight traffic manager, Boston and Albany Railroad Company.

W. A. Steenbergh, Newburgh, for the Central Hudson Steamboat Company.

J. G. Hackett, Rutland, Vt., for the Rutland Railroad Company.

BY THE COMMISSION:

The steam railroad carriers subject to the jurisdiction of this Commission ask the Commission to issue a special permission order authorizing such carriers to issue and file with the Commission, effective August 26, 1920, tariffs or supplements to tariffs providing for an increase of 40 per cent in all existing freight rates, except rates on fluid milk, cream, and articles taking same rates, whether transported in ordinary freight trains or special milk trains; an increase of 20 per cent in rates on fluid milk, cream, and articles taking same rates; and an increase of 40 per cent in charges for switching, transit, weighing, diversion, reconsignment, light-erage, floatage, storage (not including track storage) and transfer, where the carriers provide separate charges against shippers for such services, also the revision of switching absorption tariffs so as to provide for the revision of switching absorptions in accordance with the increased switching charges petitioned for, subject to the rules and conditions prescribed by the Interstate Commerce Commission as to interstate rates and charges contained in its opinion in the matter of the Application of Carriers for Authority to Increase Rates (Ex Parte No. 74) dated July 29, 1920.

It is in evidence on the application and indeed it is a matter of common knowledge that the Interstate Commerce Commission in the case above referred to authorized such

increases as to interstate traffic in what was designated as the Eastern Group, including, roughly speaking, the northeastern part of the United States and extending southerly to lines in Virginia and West Virginia and westerly to lines in Illinois. The application to this Commission is based not only upon the alleged revenue necessities of the petitioners but also upon established relationships between intrastate and interstate rates and a necessity of avoiding undue preferences or unjust discriminations which would result should there be a substantial difference in rate structures and bases as between traffic wholly within the State of New York and traffic moving interstate.

The evidence submitted consists of the entire record including the evidence, opinion, and order in the proceeding before the Interstate Commerce Commission known as *Ex Parte* No. 74, the testimony of Mr. Daniel Willard as to the general situation and needs of the carriers, and certain formal documentary proof. At a hearing held at Albany, August 17, 1920, after general notice given to the press and special notice to municipal officers, chambers of commerce, and other commercial bodies, a large number of persons attended and no one voiced opposition to the general purpose of the petition. A large number of letters and telegrams have also been received from commercial bodies and shippers, nearly all of them urging the Commission to grant the petition. On the hearing, however, objection was made to extending the proposed increase to certain particular classes of traffic. The Corporation Counsel of the City of New York was represented for the purpose of asking an adjournment in order to afford time to make a thorough investigation of the subject. The disposition we are about to make of the case amply protects all these interests.

The evidence before the Interstate Commerce Commission discloses the necessity of some very substantial increases in rates in order to enable the carriers generally to meet their obligations to the public, and especially to meet the require-

ments of the Transportation Act of 1920. The findings on this subject of the Interstate Commerce Commission, while not binding upon this Commission in the present proceeding, are not without strong probative force. We have no evidence that the situation of the petitioning carriers, in so far as their purely intrastate business within the State of New York is concerned, is similar to that of all the carriers in the Eastern Group as to their entire traffic. We are not, however, called upon in this proceeding to determine finally the justice or reasonableness of any or all of the intrastate rates proposed. Under the law of this State the carriers might file tariffs containing the proposed increases, and they would become effective after thirty days unless upon complaint or on its own motion the Commission should suspend any or all of them pending an investigation as to their reasonableness. On the hearing it was stipulated on behalf of the petitioners that if permission were given to make the tariffs effective on short notice any rate or rates therein contained might be suspended at any time within thirty days after the filing thereof in the same manner as if they had not yet become effective. This retains to the Commission all the power that it would have to investigate and adjust the rates if the tariffs were filed under the general provisions of sections 28 and 29 of the Public Service Commissions Law.

The evidence before us establishes a fair probability if not a presumption that a general substantial increase in rates is necessary. The interstate rates by permission of the Interstate Commerce Commission are to become effective August 26, 1920. If the present petition is not granted there will, at the very best, result a considerable period of time during which the interstate increases will be effective and the intrastate rates will remain on the present basis. The interstate increases allowed are universal and so great in amount that there would result a very great disparity between interstate and intrastate rates. This would have a disturbing influence

on business of all character and the disturbance might prove disastrous in some lines. There would also result a multitude of unwarranted discriminations with violations of the long and short haul clause and of the rule that through rates must not exceed the sum of the locals. The rates of the New York Central between New York and Buffalo, to mention a single instance, would be approximately 40 per cent lower than those on the Lackawanna, Lehigh Valley, Erie, and Pennsylvania. The consequence of this state of affairs for even a short period can readily be imagined.

Sound public policy and commercial necessity both dictate that a special permission should be granted, but in granting it the Commission does not indicate its approval or disapproval of the rates contained in the tariff. These will be subject to complaint, investigation, and suspension if the propriety of suspension in any case is made to appear.

The foregoing applies to freight rates generally with other incidental special charges. In so far as the petition asks an increase of 20 per cent in rates on fluid milk, cream, and articles taking the same rates, the Interstate Commerce Commission treated this traffic on the same basis as it treated the passenger rates because milk and cream are usually carried in passenger trains. It may be that in this State the great bulk of milk and cream is carried in special milk trains, but their equipment and movement harmonize more closely with passenger operation than with freight operation. Fluid milk, cream, and articles taking the same rates should therefore be excepted from the operation of this order.

In the Matter of the Petition or Complaint of THE NEW YORK CENTRAL RAILROAD COMPANY; also THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY; the LEHIGH VALLEY RAILROAD COMPANY; and OTHER STEAM RAILROAD COMPANIES, in respect to proposed higher passenger fares. [Case No. 7704.]

The Interstate Commerce Commission granted to the steam railroads authority to establish interstate passenger rates on a basis of three and six-tenths cents a mile, and to make certain other increases in rates for passenger transportation. The railroads subject to the jurisdiction of this Commission asked permission on short notice to establish similar rates for intrastate passenger traffic. *Held:*

1. Section 57 of the Railroad Law prescribing a maximum rate of three cents a mile for all of the important railroads within the State, this Commission has no authority, except under section 49 of the Public Service Commissions Law, to permit rates in excess of such maximum on the roads to which it relates, and the only authority under section 49 for such action is where the maximum rates chargeable are insufficient to yield reasonable compensation for the services rendered.

2. The petitioners not asserting or proving that the maximum rates chargeable under the statute are insufficient to yield reasonable compensation, but relying solely upon the ground that the enforcement of the statutory maximum in connection with the higher rates authorized interstate would be unjustly discriminatory and preferential as between interstate and intrastate travel, the petition must be denied.

3. The petition being in behalf of all steam railroads and affording no basis for a separate determination in respect of roads not within the limitations of section 57 of the Railroad Law, must be denied in its entirety, reserving to any roads not within the limitations of section 57, the right to make separate applications upon the merits of each case.

Decided August 19, 1920.

Appearances:

C. C. Paulding, Grand Central Terminal, New York city, and associated with him the following as a Committee of Counsel: *W. L. Visscher*, *Clyde Brown*, *John B. Kerr*, *Mr. Andrus* of the New York, Ontario and Western Railway

Company, *Messrs. Noyes and Waldron* of The Delaware and Hudson Company, *Mr. R. W. Barrett* of the Lehigh Valley Railroad Company, and *Mr. Brownell* of the Erie Railroad Company, and *Mr. Cole* of the Boston and Maine Railroad.

BY THE COMMISSION:

The steam railroads subject to the jurisdiction of this Commission ask authority to file tariffs effective on short notice whereby passenger rates will be increased 20 per cent, a surcharge made upon passengers in sleeping and parlor cars amounting to 50 per cent of the charge for space in such cars, and an increase of 20 per cent made in excess baggage rates. The petition is informal and very general in its terms, but at the hearing held in Albany, August 17, 1920, it was stated on behalf of the petitioners that the object was to make intrastate rates within the State of New York correspond to the increased rates interstate authorized by the Interstate Commerce Commission in the general rate increase case Ex Parte 74. Concurrently with this application there was made by the same carriers an application to file effective on short notice, increases in freight rates. Such permission was granted in case No. 7693 for reasons stated in a memorandum accompanying the order. The instant case presents entirely different legal questions.

The passenger rates now in effect are those imposed by the United States Railroad Administration during Federal control and continued in effect with certain qualifications by the Transportation Act of 1920. The basic rate is three cents a mile and the proposed increase for ordinary transportation results in a rate of three and six-tenths cents a mile. The proposed surcharge on passengers in sleeping and parlor cars still further increases the rate for that class of passengers. Section 57 of the Railroad Law provides as follows:

Rates of fare. Subject to the provisions of the public service commissions law, every railroad corporation may fix and collect the fol-

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lowing rates of fare as compensation to be paid for transporting any passenger and his baggage, not exceeding one hundred and fifty pounds in weight, for each mile or fraction of a mile.

. . .

2. If a road not incorporated prior to May fifteenth, eighteen hundred and seventy-nine, and not located in the counties of New York and Kings, or within the limits of any incorporated city, and not more than twenty-five miles in length, five cents; if over twenty-five and not more than forty miles, four cents; and if over forty miles, three cents.

. . .

5. In all other cases, three cents for every such mile or fraction thereof, with a right to a minimum single fare of not less than five cents.

Subdivision 1 not quoted provides for roads propelled by rope or cable. The other portions omitted relate to narrow-gauge roads, those with grades of two hundred feet to the mile and upward, and roads not exceeding fifteen miles in length and not entering an incorporated city. The section also provides that it shall not be construed to allow any rate of fare for way passengers greater than two cents per mile on The New York Central Railroad Company's tracks wherever it is restricted to that rate of fare, that is to say, between Albany and Buffalo. The general effect of this section is to fix a maximum rate of three cents a mile on all important roads in the State. We therefore deal with the case on this basis. If any roads not subject to the limitation desire to put into effect the proposed rates they may make separate application and show reasons for exceptional treatment. This application is made by the roads as an entirety, and the record affords no basis for a discrimination among them.

It was held in *People ex rel. U. & D. R. R. Co. v. Pub. Ser. Commission*, 171 App. Div. 607, affirmed, 218 N. Y. 642, that section 60 of the Railroad Law establishing mileage book rates was amended and revised together with section 57 with reference to each other and to the Public Service Commissions Law, and further that under section 49 of the Public Service Commissions Law the Commission is authorized to

permit a rate in excess of that fixed by statute when after an investigation it appears that the statutory rate is insufficient; that the limitations of the statute remain on the railroads but not on the power of the Commission. It quite clearly appears that the court was of the opinion that the carrier could not of its own volition file tariffs and put into effect rates in excess of those fixed by statute, and that to effect this purpose it must invoke the power of the Commission under section 49. The relevant portion of section 49 is subdivision 1 and is as follows:

Whenever either commission shall be of opinion, after a hearing had upon its own motion or upon a complaint, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for the transportation of persons or property within the state, or that the regulations or practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in anywise in violation of any provision of law, or that the maximum rates, fares or charges, chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall with due regard among other things to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, notwithstanding that a higher rate, fare or charge has been heretofore authorized by statute, and shall fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed.

This section as originally enacted did not contain the clause beginning "or the maximum rates, fares or charges, chargeable by any such common carrier, railroad or street railroad corporation are insufficient to yield sufficient compensation," etc. Originally the section referred to excessive, unjust, or unreasonable rates or practices. The provision

last quoted permitting the carrier to complain when rates are insufficient was added by amendment by chapter 546 of the laws of 1911, and is the only provision directly applicable to the case (*People ex rel. U. & D. R. R. Co. v. Pub. Ser. Commission, supra*). On the hearing the carriers did not assert that they claim relief because the rates are insufficient under section 49, and they certainly presented no evidence sufficient to warrant the Commission in making a final determination to that effect. All that was asserted was that when the interstate rates go into effect the present intrastate rates will be unjustly discriminatory or unduly preferential as between interstate and intrastate passenger traffic and, therefore, unlawful under subdivision 4 of section 13 of the Interstate Commerce Act as amended by Transportation Act of February 28, 1920. Subdivision 4, section 13, is as follows:

Whenever in any such investigation the Interstate Commerce Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

It is not claimed that the present rates are unjustly discriminatory or unduly preferential as between points wholly within the State of New York. The discrimination claimed relates to discrimination between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other. A discrimination may, however,

as well result from interstate rates that are too high or too low as from intrastate rates that are too high or too low, and the proper correction may be in the interstate rates over which this Commission has no control. There is no express authority given to the Commission to grant rates in excess of those authorized by statute except under section 49, which has to do only with rates insufficient in themselves. We should not in the absence of legislative authority arrogate to the Commission power to authorize a rate in excess of the statutory maximum merely to enforce a recent act of Congress which contains within itself a special remedy.

The freight rate case is nothing more than an application for a short notice permission and involves no predetermination of the propriety of the rates. This application while it is in part for a short notice permission, demands as a preliminary an investigation and finding of facts sufficient to authorize and demand that the Commission disregard the statutory limitation, and the applicants present no evidence warranting such a finding.

As already stated if there are any carriers not within the three cent limitation and whose cases demand special consideration their claims may be presented. The excess baggage rates as well as rates for milk and cream carried on passenger trains were treated by the Interstate Commerce Commission as a part of the case relating to passenger rates. We should treat them in the same manner and deny the application generally.

In the Matter of Proposed Temporary Shutdown in Furnishing Electric Power by CHATHAM ELECTRIC LIGHT, HEAT AND POWER COMPANY to thereafter enable current to be furnished High Rock Knitting Company of Philmont, Columbia county. [Case No. 7680.]

When questions arise between two public service corporations, primarily it is the duty of the Commission to protect the interests of the public and to permit a legitimate expansion of business when such expansion will serve the public, and any controversy between the companies themselves as to damages which may arise should be left for solution to the courts.

Decided August 19, 1920.

Appearances:

John C. Dardess, Esq., attorney for Chatham Electric Light, Heat and Power Company.

Stewart W. Bowers, Esq., attorney for States Metals Company, Inc.

BARHITE, Commissioner:

The Chatham Electric Light, Heat and Power Company has since the latter part of March, 1919, furnished the States Metals Company with electric current, pursuant to an order of this Commission and a contract made between the two companies under directions contained in the order. The contract was duly executed by the States Metals Company, but for reasons not material here has not been actually signed by the Chatham Company, although the provisions of the contract have been recognized and followed by both companies. The business relations between the companies for over a year past have been harmonious, the Chatham Company furnishing the current, and the States Company paying for it pursuant to the direction of this Commission and the terms of the contract. By the order the current is to be fur-

nished "in quantity sufficient to meet the needs" of the States Company and by the contract "at all times, day and night, Sundays and holidays included". The States Company operates continuously. The Chatham Company now has the opportunity to add another company to its list of customers. To furnish this last customer with service it will be necessary to reinsulate the transmission line used by the States Company as the voltage upon the line must be increased from 6600 to 12,000. To do this work the Chatham Company claims the current must be shut off from the line from 7 a. m. to 4 p. m. upon each of three different days. The work in question is dangerous work, and can only be performed by specially trained men difficult to obtain, if the current is allowed upon the line during the time of making the changes. The States Metals Company objects to shutting off the current unless it is paid at the rate of \$700 per day, claiming that its damages will amount to that sum.

The questions whether the States Metals Company is legally entitled to damages, and the amount of those damages, are for the courts to determine. This Commission should confine itself solely to the public interests and to the efforts of the Chatham Company to serve those interests by furnishing current to those who demand and need it. This is exactly what the Commission did when it directed the Chatham Company to change its plant so as to provide three phase current instead of single phase current to provide for the necessities of the States Metals Company. It is true that the Commission in return for the expense to be incurred for the benefit of the States Metals Company directed that company to agree to purchase a certain amount of current for a certain period of time, and named the way in which proper rates were to be fixed. This course was necessary because if the Chatham Company had simply been ordered to furnish its customers with three phase current the courts could neither have fixed a proper rate nor provided that the

customer must in return for the expense incurred for its benefit purchase a stipulated amount of electricity. Here the case is different: a contract exists between the parties, and the courts have full jurisdiction to determine whether the contract has been violated, and if so, to name the penalty. This Commission has no power to directly grant a judgment against either company, and to attempt to do so indirectly might work great injustice. To shut off the current for the period and purpose required would be a violation of the order of this Commission. When the Commission has provided for that contingency it has done its full duty, and any rights which may have been violated as between the parties must be relegated to the proper tribunal.

All concur.

In the Matter of the Complaints of PAULINE SCHULTZ and V. NAPOLIELLO of Yonkers *against* WESTCHESTER LIGHTING COMPANY, asking that its gas main be extended on Bronxville road from the present terminus at Howe place to Perry place, and from Bronxville road into Miller place, one hundred and sixty feet, and from Bronxville road through Wilbur place to Deshon avenue; and that gas be furnished residences: this locality is known as Armour Villa Park in the city of Yonkers. [Case No. 7651.]

Decided August 24, 1920.

Appearances:

Max Cohen, Yonkers, for complainants.

B. W. Stilwell, Vice-president, for the respondent.

BARHITE, Commissioner:

This is an application to compel the Westchester Lighting Company to extend its mains in Armour Villa Park in the city of Yonkers from the present terminus at the corner of Bronxville road and Howe place, through Bronxville road and Cross street to Perry place, with side mains extending through Miller place and Wilbur place to Deshon avenue. The length of mains to be laid is approximately 1590 feet, and the total cost, according to the figures of the company, which are not disputed by the complainants, would be \$5720. The original application requested extensions from the corner of Bronxville road and Howe place, through Bronxville road and Cross street to Perry place, with side mains extending from Bronxville road 160 feet and the length of Wilbur place to Deshon avenue, a total distance of approximately 1370 feet. It is conceded that the new construction will supply nine houses, including two partly completed. It is claimed by petitioners that seven additional houses within reaching distance of the mains are to be built in the future, but there

is no definite evidence upon this point. There is no positive proof that at the present time either Wilbur place or Miller place is a public street, although there is evidence that proceedings are now pending for the purpose of having them made public thoroughfares. The locality in question is supplied with electricity for lighting purposes, but the gas is wanted for heat and cooking. Statements were made at the hearing by counsel that the petitioners would give a bond that they would contribute their share to provide the company a fair return upon its investments if the extensions are made, and 6 per cent was suggested as such return. The company is willing to make the extensions providing those who are to be served pay the expense of making the extensions, the amount contributed to be repaid to the contributors out of the income derived from the extensions. It is not easy to determine between these conflicting proposals what should be done, with justice to all the parties. The company should at its own expense expand its facilities to reasonably meet the existing needs of citizens within the district of its operations. On the other hand, it should not be required to invest its own capital for the purpose of supplying the needs of the citizens, or for the purpose of building up and improving a community without receiving a proper return. In this case the facts show a need for gas by the citizens, but it is quite evident that the company can only supply that need by facing a loss, if it is required to assume, at the outset, all of the expense. The burden should be divided, and the company should pay back the portion of the expense contributed by its customers as income is received from the proposed extension.

All concur.

Complaint of J. F. SHEAHAN *against* UNITED STATES RAILROAD ADMINISTRATION, CENTRAL NEW ENGLAND RAILWAY, as to allowing pedestrians to use the Poughkeepsie bridge. [Case No. 6800.]

The federal authorities have control over a change of plans which affects the bridge crossing the Hudson river at Poughkeepsie.

This Commission can not legally compel the owner of such bridge to provide for the safe passage of pedestrians.

Decided August 24, 1920.

Appearances:

Rev. J. F. Sheahan, complainant.

John J. Mylod, Philip A. Mylod, and Alexander C. Dow, attorneys for complainant.

Charles M. Sheafe, jr., E. R. Brumley, and Samuel H. Brown, Grand Central Terminal, New York city, attorneys for the respondent, Central New England Railway Company.

KELLOGG, Commissioner:

The complainant here voices a well defined demand on the part of the public in the city of Poughkeepsie and its vicinity, which with greater or less insistence during the past thirty years, since the opening of the Poughkeepsie bridge across the Hudson river, has been made to permit the free passage of pedestrians over that structure.

Jurisdiction of the Commission to interfere in the matter or take any action therein was at once questioned by the respondent railroad company, but it was the view of the sitting Commissioner that this much mooted question should be finally decided upon the questions of fact and of law involved therein, believing that under section 57 of the Public Service Commissions Law, it might become the duty of this Commission, if the Railroad company was failing to perform a

duty imposed by law, to call the same to the attention of the courts, with the request for an order to compel the performance of such unfulfilled duty.

On account of this belief various hearings were held at the city of Poughkeepsie, at which many witnesses were sworn, and the views of parties, municipalities, and public bodies submitted. A personal inspection of the bridge was made on a train furnished for that purpose by the Railroad company, attended by counsel on both sides, and various officials and interested parties.

As a result of these hearings and an examination of the law applicable to the situation, which will be in detail set forth in this Opinion, it is to be hoped that the facts have been so developed that the ultimate rights of the parties may be definitely determined, and if the decision which shall be arrived at by this Commission is felt to be erroneous by any interested party, it may be reviewed in the courts, if thought desirable, upon a record fully disclosing the facts.

It is important that this controversy, which has raged all these years, at times with substantial violence, and in interims with more calmness, should be removed by authoritative decision from the field of continued disputation.

The bridge in question was built under the authority of a series of acts of the Legislature, followed by the approval of the Federal Government, in the exercise of its control over navigable streams.

By chapter 897 of the laws of 1871, the Legislature passed an act by which "The Poughkeepsie Bridge Company" was incorporated. The rights of this company, encumbered with the duties imposed as conditions for the exercise of such rights, have by various *mesne* conveyances passed to this railroad company respondent, and the privileges which it enjoys in maintaining this bridge over a navigable stream of the State with the right to use it is of course encumbered with the duties imposed by law as a condition upon which such privileges were granted.

A reading of this original act of incorporation leads to the inevitable conclusion that the charter was granted for the purpose originally of permitting not only passage thereover of railroad trains, but also to provide for general vehicular traffic, and the passage thereover of foot pedestrians and live stock. The purpose as stated in the act is:—

“constructing and maintaining a permanent bridge, appurtenances and avenues of approach thereto, for the passage and transportation of passengers, railroad trains, teams, vehicles, cattle, horses, sheep, swine and other merchandise and property, to and from the east and west banks of the Hudson river, at such point or points between the city of Poughkeepsie and the town of Lloyd on said river.”

It is this original privilege and consequent duty of erecting a bridge, not only for the passage of railroad trains, but for all other usual highway purposes, that gives rise to the demand of the public, which has frequently found expression, that the bridge should be constructed and maintained accordingly, and undoubtedly the failure to construct and maintain such a bridge is a radical departure from the original project and the original purpose of the Legislature in granting the privilege of erecting any bridge whatsoever.

The complaint of the people is well founded in good morals and equity, and the only question is as to whether as matter of law, in view of other legislation, State and Federal, their demand is still enforceable.

A careful examination of the detail and purposes for which the bridge was to be constructed, above quoted, shows that no reference is made to “pedestrians” as such, but that pedestrians are intended to be included in the term “passengers” is apparent from the consideration of the subsequent provisions in section 7.

This section provided that after the bridge should be completed and its safety tested, and the facts certified to by the State Engineer and Surveyor, the corporation created might erect tollgates, and “fix the rate of tolls for *persons* and animals, except such as are being conveyed on railroad cars”.

It also provided that a maximum toll might be demanded of 25 cents "for every *foot passenger*".

The use of the word "passenger" to include a "pedestrian" is unusual. The lexicographers, however, state that this is a permissive use although in the Standard dictionary, the use of the word to mean "traveler" is said to be archaic.

Placing the word at the head of the list of prospective users of the proposed bridge taken in connection with the power to collect tolls from persons using the bridge, but not transported in cars, and the express fixation of a maximum charge for "foot passengers," shows that in the original plan pedestrians were included, and in accepting the franchise the corporation and its successors became bound to perform each of the purposes, and discharge all of the obligations embodied in the grant of power.

The law provided that the bridge should be commenced on or before July 1, 1872, and be completed and open for use on or before January 1, 1876. By chapter 857 of the laws of 1872, chapter 39 of the laws of 1878, chapter 50 of the laws of 1880, and chapter 77 of the laws of 1882 the date for the completion of the bridge was from time to time extended, so that by the last of these enactments such period would have expired on January 1, 1888.

Then came the enactment of chapter 695 of the laws of 1887, which amended in a very substantial manner and for a manifest purpose the first section of the act, specifying the purposes for which the bridge should be erected. The purposes for which the bridge was to be used were changed. The bridge was thereby required to be constructed "for the passage and transportation of railroad trains, passengers, merchandise and property".

All provision for the use by teams, vehicles, cattle, horses, sheep, and swine was omitted, and the word "passengers" was transposed from its original position at the head of the list to follow the word "railroad" thereby becoming limited by it. The word no longer carried its original and some-

what unusual meaning of travelers on foot, but was manifestly limited by the change in its position to railroad passengers, and the original purpose of providing for the construction of a bridge, which should bear general highway traffic by pedestrians, vehicles, and live stock was abandoned, and a railroad bridge alone was provided for. By the enactment of this legislation, the duty which was imposed originally upon the company to provide for the passage of foot passengers was removed.

The act in question further extended the time for the completion of the bridge to January 1, 1889, and thereunder the bridge was completed and the operation of trains thereover commenced within the time specified.

Subsequently to the construction of the bridge, and the investment of the large amount of capital required therefor, and its completion under an act which, as has been noted, did not impose the duty of providing for general highway traffic, the Legislature by chapter 198 of the laws of 1891 added to the original act the following provisions:

"The corporation hereby created shall provide and maintain a convenient path and approaches for foot passengers desiring to cross said bridge and shall erect tollgates and fix the rate of toll for such foot passengers entering upon or crossing over said bridge, its entrances, avenues and approaches, but no greater toll shall be exacted or charged for every foot passenger entering upon or passing over said bridge than seven cents, and said rates of toll shall be posted up conspicuously at each end of said bridge."

This added section was by chapter 375 of the laws of 1893 amended to read as follows:

"The corporation hereby created shall, before the first day of October in the year eighteen hundred and ninety-three, provide, and thereafter maintain a convenient and suitable path and approaches for the passage of people on foot, and shall permit and allow all persons, without restriction as to time or day, to pass across said bridge from either of its approaches or termini, and shall erect entrance gates and fix the rate of toll for such foot passengers entering upon or crossing over said bridge, its entrances, avenues and approaches, but no greater toll shall be exacted or charged for every foot passenger entering upon or

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passing over said bridge than five cents, and said rate of toll shall be posted up conspicuously at each end of said bridge."

Inasmuch as this bridge was constructed, or at least its construction was completed, under the act of 1887, doing away with the necessity of providing passageway for general highway travel, the Legislature had no right under the constitution to impose an additional burden or obligation in the exercise of the franchise without providing for due compensation. This question was discussed by the Court of Appeals in the case of *People v. International Bridge Company*, 223 N. Y., 137.

In that case McLaughlin, J. writing the Opinion of the Court, to which there was no dissent, laid down the principle as follows:

"The state, of course, in granting the charter, reserved to itself the right to amend it at any time, but this reservation did not authorize the state, the charter having been accepted and acted upon to the extent that it had ripened into property rights, to deprive the defendant of the benefits thus obtained without compensation. Citing *Monongahela Navigation Co. v. United States*, 148 U. S. 312; *People v. O'Brien*, 111 N. Y. 1—Nor could the state impair the value of the franchise by imposing additional burdens without paying for it. Citing *Trustees of Southampton v. Jessup*, 162 N. Y. 122."

The Court in that case then proceeded to a consideration of the facts, and arrived at the conclusion that inasmuch as the original charter provided for the construction and maintenance of a bridge along the lines demanded, and the act referred to imposed no additional burden, it was constitutional. This condition does not exist in the instant case, and the converse of the proposition of the principle announced by the Court must be applied. A new burden was imposed by the laws of 1891 and 1893 over that imposed in the laws of 1887. The Legislature so understood as they incorporated in the law an express provision requiring the construction and maintenance of a foot path for pedestrians.

This provision for the construction of a bridge, after the acquisition of vested rights under laws not requiring such

construction, added an additional burden which could not be imposed upon the bridge company without its consent and without compensation.

Another consideration also intervenes. That is the limitation of the State power and the paramountcy of the Federal control over this bridge, which spans a tidal and navigable river, and is therefore within the jurisdiction of Congress.

From the earliest times, Congress in its control and guardianship over interstate commerce has made appropriations for improvements over the Hudson river. It is unnecessary to consider this principle in detail, or its broad application, as it has of late been elaborately considered by the Court of Appeals in regard to the proposed bridge at Castleton, over sixty miles farther from the ocean than the one herein involved, in case of *People v. Hudson River Connecting R. R. Corp.* 228 N. Y., 203.

Although approval by the War Department of the United States of the plans for the original construction of this bridge can not be found, it is quite evident that they were at that time passed upon, as there have been introduced in the evidence photographic records of the War Department, indicating that the Secretary of War, on February 9, 1875, saw the plans, and that such plans were under consideration by that Department, and evidently met its approval before the construction of the bridge and the investment of the large sums of money necessary therefor.

The approval of the Secretary of War, dated August 17, 1906, of plans for reconstruction of the bridge in its present condition, have been given in evidence, and such approval of any change of plans seems to be required, not only under the general power of the Federal Government over the subject, but by the enactment in 1909 by Congress of 30 Stat. L. 1151, providing:

"That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after

completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War."

If the bridge in its present condition could be properly used by foot passengers, as requested in this complaint, this Federal question might possibly not arise. But the most casual inspection of the structure indicates that substantial alterations must be provided not only in order to secure the safety of pedestrians, but also to protect boats passing under the bridge from being injured, and their passengers and crews endangered by falling objects which might be dropped from the bridge by malicious, mischievous, or careless persons.

The cost of reconstruction of the bridge to permit safe passage of pedestrians is claimed by the railroad to be very large, approximately a quarter of a million dollars. However this may be, if the duty were imposed upon it by law, the expense of performance of that duty would be no answer to a demand that it be performed.

In this connection I am only impressed with the fact that changes more or less extensive *must be made* to permit the safe passage of pedestrians, and after permitting such passage to protect vessels passing below.

This requires the approval of the Federal officials. It can not be done without their permission. No provision is made for affirmative action by Federal officials, providing for a change of the plan of construction, so as to permit with safety of all concerned the passage of pedestrians over this structure. Their only right to intervene comes when navigation is interfered with. Undoubtedly such change could be made by permission of the Federal authorities on the application of the Railroad company. But there is no provision of law under which it can be directed to make such application. Certainly no such jurisdiction lies with this Commission under its limited statutory power.

It is unnecessary to enlarge upon the fact that the present structure can not be opened for public travel without substan-

tial alterations to secure safety. The floor of the bridge is 212 feet above high water level. It is at times swept by high winds. The railroad tracks are separated from the foot way used by the railroad operatives by a stringer, which is overlapped by locomotives drawing trains. At intervals of about 100 feet along the structure are necessarily maintained barrels of water for fire protection. There is no netting to protect between the pathway and the portion occupied by the trains, and there is nothing but light iron railings on the outside of the foot path, through which railing persons, especially children, might fall.

In view, therefore, of the manifest invalidity of the statutes of 1891 and 1893, requiring the establishment and maintenance of a foot path for pedestrians, coupled with the control of the Federal Government and the consequent lack of power in the State officials and courts in regard thereto, the application should be denied.

This conclusion has been reached with much regret, as public expectation of construction at this point of a bridge, available for general highway purposes, was at one time founded upon a duty imposed upon the predecessor in interest of this respondent by the law of its incorporation; since removed, however, by legislation before the bridge was finally constructed.

The complainant, his counsel, and his associates are to be commended for their public spirit in bringing this matter to our attention and initiating the investigation which has followed their complaint, and speaking for myself alone, I sincerely hope that if the recommendation of this Opinion is followed by my brethren of the Commission, and the complaint denied, the parties interested will review the decision in the courts in order that this important public question may be finally determined by the tribunal that has the ultimate word on all questions affecting our citizenry.

All concur.

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Petition of AUSABLE FORKS ELECTRIC COMPANY (INC.) under section 68, Public Service Commissions Law, for permission to construct an electric plant in the town of Jay, Essex county, and for approval of the exercise of a franchise therefor received from the town; and under section 69 for authority to issue \$25,000 in common capital stock.

Petition of AUSABLE FORKS ELECTRIC COMPANY (INC.) for a rehearing, and Petition of NORTHERN ADIRONDACK POWER COMPANY for rehearing.

Request of AUSABLE FORKS ELECTRIC COMPANY (INC.) that the Commission hear its application to construct and exercise a limited franchise in the town of Jay. [Case No. 6595.]

The rule prohibiting the entrance of a competing electric light company into a field already sufficiently occupied considered and applied.

Decided August 24, 1920.

Appearances:

Charles J. Vert, Plattsburgh, for the applicant.

Fred A. Torrance, Ausable Forks, representing various citizens of the town of Jay, and also the Town of Jay.

Thomas O'Connor, Waterford, for the Northern Adirondack Power Company, in opposition.

KELLOGG, Commissioner:

The controversy between the Northern Adirondack Power Company, which furnishes light to a portion of the unincorporated village of Ausable Forks, and the J. & J. Rogers Company, a paper manufacturing corporation at that place, which for the past six years has occupied the attention of the courts, the Attorney-General, the Governor, and the Legislature, is again before this Commission for decision.

In this case an application made by the Ausable Forks Electric Company, Inc., a company formed by the officers of the Rogers Company, for permission to construct an electric plant in the town of Jay, for approval of the exercise of a franchise therefor received from the town, and for authority to issue capital stock was, by order made by this Commission January 27, 1920, denied.

This order was based upon the Opinion of Commissioner Fennell which, while denying the application to exercise an unlimited franchise, indicated that under a franchise limited to business done by the J. & J. Rogers Company, at the time of the construction of the transmission line of the Northern Adirondack Power Company to Ausable Forks, might be proper.

When this Opinion came before the Commission for action, it was careful not to bind itself as to the propriety of granting an application to exercise a limited franchise, and the following clause was added to the Opinion:

"This permission to present such a limited franchise is not to be regarded as an expression of opinion at this time by this Commission that consent to exercise such limited franchise will necessarily be given."

Following the order both parties filed petitions for a rehearing, and the Ausable Forks Electric Company, Inc., made application in the alternative for permission to exercise a limited franchise along the lines referred to in Commissioner Fennell's Opinion. A limited franchise was thereafter obtained from the Town Board of the Town of Jay, and is before the Commission in the proceeding.

A rehearing was had and evidence given by both parties. The question is now fairly up for decision as to whether this limited franchise restricting the operations of the petitioner to the electric lighting business done by the J. & J. Rogers Company, at the time of the construction of the transmission line of the Northern Adirondack Company in 1912, should be approved.

The facts underlying this dispute have been frequently considered. They are detailed in the Opinion rendered by this Commission In the Matter of the Application of the Paul Smith's Electric Light and Power and Railroad Company for permission to exercise franchises in this town of Jay, in case No. 4416 (IV Public Service Commission, Second District, Reports 370), in the Opinion of Commissioner Fennell in this case, in the Opinion of Mr. Justice Rudd, in *Public Service Commission, Second District v. J. & J. Rogers Company, the Northern Adirondack Power Company*, 103 Misc. 711, and in the Opinion of the Appellate Division in the same case, 184 App. Div. 705. It seems to be necessary to refer to some of these facts again in this connection.

The unincorporated village of Ausable Forks contains a population of about 2100 people, situated on both sides of the Ausable river where that stream separates the town of Black Brook in Clinton county from the town of Jay in Essex county. A substantial portion of the village lies on either side of the river.

By far the principal activity in the village is that of the J. & J. Rogers Company, which it is alleged in the petition owns about 150 buildings outside of its plant. This company transacted a business amounting approximately to \$1,080,000 gross per year prior to 1918 and the present highly increased price of paper. It is therefore natural and necessary that the interests of the J. & J. Rogers Company are very largely identified with, and in a measure indistinguishable from, the interests of the village, and it is very natural that its desires and wishes should be followed and reflected in the desires and wishes of most of the inhabitants.

In the year 1911 this Northern Adirondack Power Company, which was then named the Keeseville Electric Company, obtained a franchise and consent of this Commission to operate in the town of Jay, on the south side of the Ausable river. In the next year it obtained similar rights to operate in the town of Black Brook on the north side of said

river. These latter rights and franchises applicable to Black Brook it has never exercised, but did, however, construct its transmission line and commenced to and continued to serve the people on the south Jay side of the river.

At that time the J. & J. Rogers Company was transacting an electric lighting business in the village, most of it without compensation and much of it for its own benefit, but some of the electric light generated by it was furnished to citizens, for which it received the amount of \$2700 per year. The relations at the outset and for a short time thereafter between the Power Company and the Rogers Company appeared to be friendly. They must necessarily have been so as it is quite apparent that the Power Company would never have obtained permission to enter this village without the consent of the Rogers Company which was the dominant influence there, and in fact the franchise to operate on the Black Brook side was signed by Mr. James Rogers, the president of the company, as one of the town officers.

It can not be found that there is much substantiation in fact for the claim now made by the Power Company, that it was induced to construct its transmission line to this village in the belief that it was to absorb all of the electric lighting business there. The line was apparently constructed primarily to furnish power to a proposed granite plant and works of the Witherbee Sherman Company with some surplus power to be furnished to the Rogers Company. Correspondence between the president of the Power Company and officers of the Rogers Company in November 1911, negative the contention that any understanding existed prior to the construction of the transmission line, that the entire electric lighting business in the village was to be taken over by the Power Company, or that the enterprise was initiated in reliance upon any such understanding.

In a letter dated November 4, 1911, from the Power Company to the J. & J. Rogers Company, this language was used:

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"We think it best now to go ahead with our own transmission line and we ought to be ready for business by the 1st of January as I find my wheel will be in place about the 1st of December. In this connection, you will recollect that the writer offered about a year ago to take over your lighting business at a fair valuation.

"In the recent correspondence we have had with the Public Service Commission regarding making reports on the kilowatt-hour out-put of our business we had occasion to mention that we expected to commence business in Ausable Forks at an early date to which the Commission replied that you had written them stating that you expected to turn your business over to us shortly. If this is your intention why not make a clean job of the matter and for that purpose we will make you the following offer."

In the answer to the above letter, bearing date November 8, 1911, the J. & J. Rogers Company uses the following language:

"As advised you by Mr. Chahoon when you were here, we discussed carefully your proposition to use our power line this coming winter for conveying your power to Ausable Forks, and decided this would be now inexpedient for reasons explained to you by Mr. Chahoon, so that we must absolutely decline to entertain this proposition, regretting that it may possibly cause you some inconvenience.

"In regard to the electric lights in the town of Jay, we advised the Public Service Commission that we understood you were coming in here with electric power and would no doubt take over the street lights in some of the houses in town.

"We do not care to sell our poles, wires, etc., in the town of Jay, as we need them for use in our own property.

"We see no reason for any friction in the matter as we shall not cut rates under any circumstances, for, as previously explained to you, the electric lighting in this town, on our part, is a matter of accommodation, rather than profit to us."

Replying to the above letter, the Keeseville Company, under date of November 10, 1911, has this to say:

"In regard to the electric light matter, we only wrote thinking that you had changed your mind in the matter and would probably like to dispose of your lines. We are content with your decision. As to my reference to possible friction, my experience in matters of this kind is that even where the parties themselves are acting in harmony, their subordinates are apt to make trouble. I certainly did not wish you to infer that I had a chip on my shoulder. As to your rates, I do not

even know what they are and we had proposed to furnish the same rates at Ausable Forks as we do elsewhere, as I suppose the Commission would require us to do in any event."

It is possible that subsequent to this correspondence some understanding may have been entered into between the president and owner of the Power Company, now dead, and the Rogers Company for taking over the entire business, but there is no proof of that fact, and the correspondence quoted indicates that the Power Company intended to construct its transmission line in any event, and did not rely upon adding to its revenues the lighting business then transacted by the Rogers Company.

In January, 1912, this Commission, being advised that the Rogers Company was transacting electric lighting business, made demand upon it that it should file a report as required by law. To this demand that company made a reply to this Commission containing the following:

"When the new electric light, heat and power company of Ausable Chasm complete their lines, the poles of which are already set, we expect to be relieved of this outside business."

referring to electric lighting furnished to parties other than themselves. Although there had been no agreement between the parties, the Rogers Company stated formally to this Commission, in response to a demand that it comply with the law in furnishing reports required from a company transacting an electric lighting business, that it intended to go out of that business and transfer the same to this power company.

Either that was their intention or else this written statement of its officer was a pure prevarication for the purpose of inducing this Commission to refrain from enforcing the law compelling the company to report on its business transacted of this nature. Whatever may have been their intention at that time, it shortly developed that instead of transferring its business to this power company it was negotiating with another company. The Paul Smith's Electric Light and Power and Railroad Company which had several power stations and transmission lines in Franklin county and a

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power plant at Union Falls in the town of Black Brook, in 1913 entered into a contract with the Rogers Company to furnish electric current.

Its transmission line was constructed, being completed in October, 1913, to the village of Ausable Forks. It entered that community from the opposite direction from that of the Northern Adirondack Power Company's line and the transmission distance was somewhat longer. In addition to furnishing power to the Rogers Company, it obtained a franchise, which it has ever since exercised, for furnishing electric light commercially and for street lighting on the Black Brook side of the river.

We have, therefore, already in this small community a condition where two electric lighting companies are in operation. Instead of transferring its electric lighting business to the Northern Adirondack Power Company, the Rogers Company attempted to transfer it to the Paul Smith's Company. The latter company made application to this Commission for permission to exercise franchises, which permission was granted as to the Black Brook side, but was denied as to the Jay side of the river, for the reason that it came within improper competition with the Northern Adirondack Power Company which had constructed its line. The reason that this protection was extended by this Commission is stated by Commissioner Irvine in his Opinion in that case as follows:

"The expensive transmission line from Ausable Chasm, as well as the village system, in part at least, was built then with an understanding on both sides that the Northern Adirondack Power Company would not encounter the competition of the Rogers Company. Should this enterprise on the part of the Northern Adirondack Power Company, carried out lawfully and apparently in good faith, be frustrated by the Rogers Company transferring its rights to the present applicant? The Paul Smith's Company built its line and made its purchase from the Rogers Company with knowledge or notice of the rights of the Northern Adirondack Power Company. If it had applied to this Commission before it completed the purchase, as it should have done, for an approval of the transfer, it would have been met with the fact

that the Northern Adirondack Power Company was already in the lawful exercise of a franchise in Jay, and that its lines had been constructed under the well founded belief, if not agreement, that it would not encounter opposition from the proposed vendors. The case of the Paul Smith's Company is rendered no stronger by its taking over the property without the consent of this Commission, and by operation for so long a period without the approval by this Commission of any franchise.

"Some attempt was made at the hearing to throw doubt upon the ability of the Northern Adirondack Power Company to furnish proper service in Jay. The evidence, however, shows that it has facilities for any service that is likely to be there required." (IV P. S. C. 2nd D. Reports 375)

After this denial of the application of the Paul Smith's Company by this Commission, the Rogers Company continued to itself perform the electric lighting service. This was in violation of law. An amendment to the statute permitting the transaction of such business by a corporation of this nature was passed by the Legislature but vetoed by the Governor. The Northern Adirondack Power Company now evidently attempted to fight back.

Application was made to the Attorney-General to dissolve the Rogers Company, on the ground it was doing business in violation of law. The Attorney-General decided that unless it ceased doing such business, action should be brought to forfeit its charter. It continued.

The Attorney-General then stating that the action proposed being in the nature of capital punishment, which would result in the destruction of a corporation which was doing a very large business, of which the electric lighting business was a very small percentage, recommended to this Commission that action be brought under section 74 of the Public Service Commissions Law to stop the further illegal transaction of this lighting business by the Rogers Company. Action was accordingly brought and judgment entered by the Supreme Court and affirmed by the Appellate Division, directing the cessation by the Rogers Company of the electric lighting business.

After the decision in that case at special term, and pending the appeal, this petitioner was incorporated by officers of the Rogers Company for the purpose of further continuing, if the appeal proved unsuccessful, the attempt, under the form of a new corporation, to continue the electric lighting business and to prevent the Northern Adirondack Power Company from succeeding thereto in the town of Jay. On January 1, 1919, pursuant to said judgment of the Supreme Court the Rogers Company ceased to do electric lighting business, and at the expenditure of additional capital the Northern Adirondack Power Company arranged to, and thereafter did supply, the former customers of the Rogers Company.

It is claimed that the Power Company renders inadequate service. This claim, as has already been noted, was somewhat discussed by Commissioner Irvine in the Paul Smith's case. It is quite apparent that a company serving a limited locality, a part only of a community of 2100 inhabitants, can not be expected to make a capital investment to render absolutely perfect service. At times there have been breaks and intermissions in the service rendered. Whatever defects exist in a plant or line which can be remedied should be corrected. In fact recommendations have been made by an inspector of this Commission looking to improvement of this plant so as to perform adequate service.

A proceeding is now pending based upon complaints as to service before this Commission which should result in the correction of whatever improper situation exists in the construction of these lines or the transmission of current through them. These complaints have been numerous, but following the lead of the Rogers Company there has been a very active attack on this company. It is not entirely clear that all of the complainants wish to have the service improved by this company. There is indication that as to some of them the remedy desired is not an improvement of service but the removal of this company entirely from the scene and the

substitution of the Rogers Company or its subsidiary corporation in its place.

These complaints are not always consistent. For instance, it is urged in the brief here that the power furnished in the day time becomes inadequate at night, evidently upon a theory that the turning on of the lighting system reduces the voltage. In the proceeding, upon the complaint as to the service, it was testified to that the power was better after the lights were turned on in the evening than in the day time, based upon the theory that more attention was given to the machinery at the time when there was a substantial demand upon it than during the day time when there were but few people using the current.

These claims of course contradict each other, and they are merely cited here to show that the attitude toward this company reflecting as it does the antagonism of the Rogers Company, which many of the community loyally support, leads to some extent to an exaggeration in the statements of their grievances. Defects in service should be and must be remedied, and undoubtedly will be corrected in the proceeding now pending for that purpose. It is not proper to permit a third lighting company to operate in this small village still further subdividing revenues, which may result in destroying financially a company already legally upon the scene of operations.

It is unfortunate that the friendliness between the Rogers Company and this power company, which existed at the outset, did not continue. It is suggested throughout this case in the evidence and in the briefs of counsel that the Rogers Company has a selfish motive; that it wishes to obtain the control of all water power on the Ausable river; that the only remaining ownership there other than its own is that of this power company, and Mrs. Powers its owner; and that it hopes by injuring the standing and limiting the revenues, and therefore the value, of the property of this power com-

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pany to purchase at a price less than their value its rights on this stream.

Manifestly the commercially proper and economical thing to do is for the Rogers Company to acquire these powers, and Commissioner Carr spent many days and took much pains to arrange for a sale and to procure an option from the Power Company. He encouraged it to spend several thousand dollars to perfect its titles in order to transfer a marketable, unclouded title, yet after all this effort, with the actual or apparent acquiescence of the Rogers Company, the latter at the end concluded not to purchase.

Commissioner Fennell again undertook the task, and although encouraged to some extent by the parties met with failure.

Evidence was given of the destruction by the Rogers Company of a dam upon a water power jointly owned by themselves and Mrs. Powers. This is given as evidence of another act tending to depreciate the value of the property of the owner of this power company and to discourage her from further contest, all in the ultimate hope of obtaining her property at less than its actual value.

These matters are strongly urged upon the attention of this Commission, but they merely go to the motive of the Rogers Company, which is not material here. Whether or not they are attempting to depreciate the value of the other power rights on the Ausable river with the purpose of ultimate acquisition at as low a price as possible can not and should not affect this decision, and their alleged motive is given no weight in arriving at a conclusion.

It is unfortunate that the attitude for many years between the Rogers Company and this public utility company, which might to a great extent have been helpful to each other, should be full of hostility instead of friendliness and mutual aid and support, but the fact remains that this condition exists and has existed in great intensity for many years. It

is brought into the record here by both sides, but it has no place in this decision.

Brushing aside these many collateral contentions which have been submitted to us, the position is comparatively plain, and our duty is simple. Already two lighting companies occupy the streets and public places, and furnish electric light and power to this small community. The public activities are divided by the Ausable river. It is now sought to introduce a third company to exercise a franchise along limited lines but including all the electric lighting that was furnished in 1912 by the Rogers Company which is a large proportion of the commercial electric lighting of the community. There is no public necessity for a third company. If defective service is rendered it should be improved; but the rights of the company should not be forfeited, and the value of securities issued by authority of this Commission destroyed or impaired.

If any portion of the fire fighting apparatus of the village, operated by electricity, is not usable in connection with the line of the power company, it should if necessary for proper protection from fire, be adjusted so as to be so usable.

The application to exercise the franchise now presented should be denied, and the applications of both parties to reopen the order made herein January 27, 1920, should, after the rehearing which has now been had, also be denied.

It follows that the prayer of the original petition in this case for authority to issue capital stock, should also be denied.

All concur.

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Petition or Complaint of NEW YORK STATE RAILWAYS under subdivision 1, section 49, Public Service Commissions Law and section 181, Railroad Law, for permission to increase passenger fares in the city of Rochester; under section 29, Public Service Commissions Law, for permission to put in effect new tariff on short notice; under section 53, Public Service Commissions Law, for permission to exercise fare right under amendment of city franchises. [Case No. 7661.]

1. On an application by the New York State Railways to increase fares in the city of Rochester the evidence, while lacking in some respects in detail was found, presuming all doubtful points most strongly against the applicant, to require the establishment of a cash fare of 7 cents.

2. Charges for depreciation should be based on the probable serviceable life of the property rather than on a percentage of revenue.

3. Where because of franchise restrictions a street railroad company has for several years been unable properly to maintain its property, in calculating future operating expenses the deferred maintenance was spread over a period of three years.

4. The application of the street railroad company for authority to sell ten tickets for 65 cents at certain points in the city was denied, and the company was required to permit the sale by conductors of four tickets for 26 cents. Commissioners Irvine and Barhite dissenting.

Decided August 24, 1920.

Appearances:

Harris, Beach, Harris & Matson (by W. A. Matson), Rochester, as attorneys for petitioner.

J. F. Hamilton, Rochester, as President, *J. M. Joel*, Rochester, as general auditor, and *B. E. Wilson* as general passenger agent, Rochester, of petitioner.

Charles L. Pierce, Corporation Counsel, for the City of Rochester.

Charles R. Barnes, as Commissioner of Railways of Rochester.

IRVINE, *Commissioner*:

The New York State Railways asks permission to increase passenger fares in the city of Rochester from 5 cents to 7 cents with universal free transfers and provision for tickets to be sold 10 for 65 cents.

A somewhat similar application was made in case No. 6090 wherein increases from 5 cents to 6 cents were sought not only in Rochester but in other cities and villages. The proceeding so far as related to Rochester came to an end because of a writ of prohibition forbidding the Commission to proceed, issued in the much cited case of *Quinby* against *Public Service Commission*, 223 N. Y. 244. The ground of this writ was that certain provisions restricting rates in Rochester to 5 cents a mile were contained in franchises granted by the city to the applicant's predecessors and that the Legislature had not delegated to the Commission authority to permit rates in excess of such franchise restrictions.

July 24, 1920, an order was entered by the Supreme Court in the *Quinby* case, modifying the writ therein allowed by adding thereto the following clause:

Nothing herein contained shall prevent or prohibit the Public Service Commission of the State of New York for the Second District, from deliberating upon and increasing rates of fare to be charged by New York State Railways in the city of Rochester, if or whenever the Common Council of the City of Rochester shall by ordinance duly passed, waive or modify the contract or franchise limitations or agreements whereby the rate of fare in the city of Rochester is limited to five cents per passenger.

By ordinance approved by the Mayor July 27, 1920, the city has enacted as follows:

§ 1. All contracts and franchise agreements in effect now or prior to July 16th, 1920, between the City of Rochester and New York State Railways, wherein or whereby the fare which the New York State Railways might charge in the city of Rochester was limited to five cents, are waived for the specific purpose of giving the Public Service Commission right and jurisdiction to entertain a petition of New York State Railways asking for an increase of fare to seven cents with universal free transfers and ten tickets for sixty-five

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cents; to deliberate and conduct all necessary proceedings thereupon and thereunder and grant such increase in fare.

§ 2. This waiver is for and during the pleasure of the Common Council of the City of Rochester only, and may be rescinded and revoked at any time by proper ordinance or other act duly passed at a regular meeting or special meeting called to consider the matter.

July 28, 1920, the present petition was filed with the Commission. At the hearing held in Albany August 5th, besides the applicant there were no appearances except Mr. Charles L. Pierce, Corporation Counsel, for the City of Rochester, and the city did not oppose the granting of the application. The legal obstacles to such an application having been removed by the proceedings above mentioned it becomes the duty of the Commission to make a determination upon the merits.

In case No. 7340, a proceeding instituted by the Commission on its own motion to inquire into the adequacy of the service rendered by the applicant in the city of Rochester, a thorough investigation was made into the financial affairs of the applicant in so far as the Rochester system and operation were concerned and embracing the period of operations down to the close of 1919. The evidence, record, documents, and reports made to the Commission by its own officers considered in that case are in evidence in the present case. In addition we have evidence on the same subject covering the period from January 1 to June 30, 1920. The additional evidence was apparently hastily prepared and lacks so much in detail that it affords no basis for an accurate determination of the needs of the company under present conditions. It happens, however, that by adopting minimum figures and indulging presumptions, where evidence is lacking or inadequate against the interests of the company the conclusion is unavoidable that the claim of the company is well founded. Detailed determinations made must be considered in the light of these circumstances, that is to say, findings in relation to operations since December 31, 1919, are not based on complete information, and should not be

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considered as binding the Commission, the company, or the public in future investigations involving a consideration of these matters.

In the case relating to service [No. 7340] it was ascertained that the actual deficit for the year 1919 in the city 5 cent fare zone was \$643,171.86. There are certain lines essentially urban in the character of travel but extending outside the city limits to Lake Ontario or Irondequoit bay. For reasons stated in the Opinion of Commissioner Barhite in the service case these should properly be considered a part of the city system. On these the 1919 deficit amounted to \$80,443.45. Interurban lines lead from Rochester to Sodus Point, and from Rochester to Geneva. Arriving at the results in the service case there was credited to city operations 5 cents on each passenger carried on interurban cars into or out of the city of Rochester, and the interurban service was charged with a due proportion of the city operating expenses. This operation showed a deficit of \$209,317.48. For the purpose of this case we should not start with the deficits above stated as these are corporate deficits after deduction of interest and other items from income. The actual operating results were as follows:

	City 5 cent zone	Suburban	Interurban	Total Rochester lines
<i>Operating Income:</i>	<i>Dollars</i>	<i>Dollars</i>	<i>Dollars</i>	<i>Dollars</i>
Railway operating revenues..	3,808,357.32	173,560.41	533,595.01	4,515,512.74
Railway operating expenses..	3,795,501.14	170,191.17	510,175.98	4,475,868.29
Net revenue, railway operation.....	12,856.18	3,369.24	23,419.03	39,644.45
Auxiliary operations, revenues.....		4,826.23		4,826.23
Auxiliary operations, expenses.....		5,388.35		5,388.35
Net revenue, auxiliary operations.....		*582.18		*582.18
Net operating revenue.....	12,856.18	2,807.12	23,419.03	39,082.33
Taxes.....	245,873.14	11,754.60	72,853.17	330,481.00
Operating income.....	*233,016.96	*8,947.67	*49,434.14	*291,398.67

* Denotes deficits.

The operating expenses above stated are not the actual expenses incurred by the company in 1919. Depreciation had been charged by taking certain percentages of gross income. This was deemed an improper basis and the depreciation accounts were readjusted and based on the estimated life of the property. There is nothing exact in any method yet proposed of calculating depreciation, but certainly a proper charge bears a definite relation to the life of the property, and bears no definite relation to gross income. The method of adjustment in the former case is followed herein.

It was found that there was a large amount of deferred maintenance and deferred replacements. In other words, the company had devoted to maintenance and replacements not what was necessary to maintain the property in suitable condition but what its revenues had enabled it to expend. The deferred maintenance for 1919 was included as an operating expense in determining what the operating expenses should be. A much less but still considerable item of deferred maintenance was attributable to 1917 and 1918. This was spread over a period of three years. This is certainly a just method. Undoubtedly the City of Rochester has realized that its street car service was rapidly deteriorating because of inability properly to maintain it on the revenues developed by a 5 cent fare, and a restoration of good service was the controlling motive in waiving the franchise restriction. If the restriction had not existed in 1917 when the 6 cent fare was sought, and had a 6 cent fare then been established it probably would have enabled the company to make the expenditures necessary to keep the plant in good condition. It can only be restored to good condition by proper maintenance from now on, including a recoupment of the maintenance deferred since 1917. For the benefit of the many who have had no occasion to familiarize themselves with such matters it may be stated that maintenance and replacements, as distinguished from extensions, betterments, and other new con-

struction, must be paid out of revenues and can not be permanently capitalized.

In May of this year the company was confronted by a demand for increased wages. The affair took the course unfortunately so common of late, a strike (which tied up the system for three days), an arbitration, and an award of higher wages. As usual, the public is the ultimate sufferer although it must not be inferred that the Commission entertains or implies any criticism of the arbitrators or deems the award excessive. If it thought the present wages high beyond reason it would treat them as it has on other occasions treated exorbitant salaries or other unreasonable operating expenses, and reduce them to what should be deemed reasonable for the purpose of determining rates. We have absolutely no basis in the evidence to determine how much the increased wages will amount to in the course of a year or for any other period. We have an income statement for the first six months of 1920, and also one for May and June. The new wages were made retroactive to May 1st, but as already stated there were three days in May when the road did not operate. The accounts presented show the operating expenses as a single item. If we consider that all expenses except wages were the same in May and June as for the preceding four months, and allow for the three days when the road did not operate, the increase in wages for one year would be indicated by \$260,102: this figure is impossible. The wages of motormen and conductors were increased one-third. These wages amounted in 1919 on the Rochester 5 cent zone lines to \$937,951.18. This would indicate an increase for motormen and conductors alone of \$312,650. There is evidence that there has already been an increase in service amounting to from 10 to 15 per cent, but we have no information as to when this began. Wages of other employees were also increased, but we have no evidence as to the amount, and inquiry on the hearing failed to elicit the information. When asked the range of increase of other

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wages the only answer was "They vary so. The minimum is around 56 cents." We do not know what they were before. The company in its petition states the aggregate increase per annum as \$641,117. Without any more definite information we can not allow more than the ascertained increase for motormen and conductors \$312,650, although we know the actual amount must be much greater.

The company proposes, if this application is granted, immediately to increase its service and to add about 20 per cent over that now existing. An estimate has been submitted of the increased expense due to this increase in service. Some small items in this estimate may be subject to criticism, but they would not in the aggregate amount to \$10,000 a year. The total increase indicated is about \$480,000.

The company has submitted estimates of revenue under different rates of fare. The 7 cent rate is the only one that need be considered. This estimate is based on a consideration of what has actually happened in the way of decreased travel and increased growth in about one hundred communities. It indicates an increased revenue of \$1,187,048. We are here dealing with a factor of great uncertainty. Averages can never be applied exactly to single cases. Generally an increase in rates has been followed by a decided reduction in the number of passengers. In a few cases it has been followed by an actual increase. It can not be assumed that the number of passengers actually increased because of the higher fare. Other causes generally local and often obscure affect the result. For the present purposes we accept the company's estimate not because we believe that it will very closely approximate the actual result, but because on the whole no better basis is attainable. The fact being indisputable that the 5 cent fare is and for several years has been inadequate to yield sufficient revenue to permit good service, to say nothing of a fair return to investors, we reach, with

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the explanations and qualifications above mentioned, a forecast of the results for one year of a 7 cent fare in the city zone alone.

<i>City</i>	
Operating revenue, 1919.....	\$3,808,387
Increase due to additional fare.....	1,187,048
Total operating revenue.....	\$4,995,405
Operating expenses, 1919.....	\$3,799,501
Increased wages.....	312,680
Increase due to new service.....	480,000
Total operating expenses.....	\$4,592,181
Operating revenue.....	\$403,284
Taxes.....	245,873
Operating income.....	\$157,381

To this operating income of \$157,381 should be added non-operating income of about \$10,000, and against this sum of \$167,000 there are fixed charges of about \$420,000. The rate of return should, however, be calculated on a sum not greater than \$157,000. According to present interest rates no less rate than 8 per cent should be considered. This yields 8 per cent on a trifle more than \$2,000,000. For the purposes of this case the city stipulated that the value of the Rochester system might be taken as \$17,500,000. Were it necessary to enter into the value we could hardly accept this stipulation as binding on the Commission or the public. The Rochester system embraces about 130 miles of track, and the value of the system on any basis must be several times \$2,000,000.

We have considered the city system alone for lack of adequate information as to the new factors in the suburban lines and the allocable revenues and expenses of the interurban. We have presented the 1919 figures on this part. Operating deficits were shown both as to the suburban and interurban operations. If we assume that the revenues of the suburban and interurban routes will be increased by the entire 40 per cent arising from the increase in rates and that expenses remain the same, although we know there has already been a large increase in wages, we find a possible operating income

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attributable to those parts of the system of \$126,000, making the entire gross income in any way attributable to Rochester about \$293,000 or 8 per cent on about \$3,600,000, another figure manifestly much below the actual value.

It is evident, therefore, that under no hypothesis can the 7 cent fare under existing circumstances or any to be foreseen in the near future yield an unreasonable return.

It is proposed to sell 10 tickets for 65 cents. It is impossible to estimate the ratio of the resulting $6\frac{1}{2}$ cent fares to the entire number. The presumption has again been indulged adversely to the applicant, and the calculations have been based on cash fares. In this connection the question is presented as to the proper method of selling the tickets. It is proposed that the conductor shall not sell them, but that they shall be placed on sale at a number of convenient points throughout the city. There are objections to either method based on entirely different reasons. On the whole, to the writer it seems best at this time to permit the company to try out its proposed method without committing the Commission to its propriety. Should adequate facilities not be provided or should the method result in undue inconvenience to the public, the Commission would entertain a complaint, and act upon the matter in the light of the experience so acquired and of further investigation unincumbered by rate problems.

A majority of the Commission is of the opinion that the tickets at the rate of $6\frac{1}{2}$ cents each should be sold in numbers fewer than ten, and that they should be purchaseable from conductors. The writer does not think so. The use of tickets sold at rates less than the cash fare creates a discrimination against the stranger and the casual rider which has nothing substantial to commend it except usage arising back in times when all kinds of discriminations were practically if not theoretically sanctioned. While I am not prepared to say that the practice should now be prohibited I believe it should not be encouraged. In the case before us it is evident that unless a serious error has been made in estimating

operating expenses the full cash rate of 7 cents will hardly be sufficient to maintain proper service, and promises no real return on the investment. Presumably the object is to carry regular passengers at a reduced rate. Certainly such passengers may reasonably be expected to provide themselves in advance with five days' supply of tickets. I might elaborate the point, but have already perhaps said enough to suggest the entire argument.

Hill, Kellogg, and Van Namee, Commissioners, concur except as to the minimum number of tickets which passengers may be permitted to purchase in order to enjoy the ticket rate and as to the method of making the tickets available to purchasers. It would seem that there must be very large numbers of patrons who would be much better accommodated if tickets were sold in multiples of four at the price of 26 cents, and also that a constant source of irritation and annoyance would probably be avoided by having the tickets available for purchase at all times from conductors on the cars, as well as at the company's offices and at the private stores where it proposes to have them on sale. It is not perceivable how the method of sale through the conductors can be disadvantageous to the company, while the corresponding convenience to the great mass of public would seem to be quite important.

Barhite, Commissioner, concurs in the Opinion of Irvine, Commissioner, and believes that the arrangements proposed in the petition with respect to the minimum number of tickets available to buyers and the method of supplying them should be approved.

No. 533:509

Petition of THE NEW YORK CENTRAL RAILROAD COMPANY under section 91, Railroad Law, for an order determining that a change shall be made in the Columbia turnpike existing bridge over its railroad in the city of Rensselaer. [Case No. 7535.]

Railroad Law, section 91. Repairs to existing structure. A railroad which has constructed and maintained at its original strength a bridge over its right of way can not be compelled to bear the whole cost of altering and strengthening the structure where changed conditions of traffic make the original structure unsafe. The cost should be apportioned under section 91 of the Railroad Law.

Liability of State and Municipalities for cost of alteration. Where a highway within the boundaries of a municipality has been improved by state funds, and subsequently has been turned over to the municipality as a part of its street system as provided by section 172-A of the Highway Law, the cost of altering and strengthening a bridge on such highway over the right of way of a Railroad company should be borne as provided by subdivision 4 of section 94 of the Railroad Law and no part of such expenses should be borne by the funds of the State Department of Highways.

Decided August 24, 1920.

Appearances:

George H. Walker, as attorney, and *G. A. Noren*, as Grade Crossing Engineer, Grand Central Terminal, New York city, for the applicant.

Arthur E. Rose, Deputy Attorney-General, and *Frank A. Hermans*, Grade Crossing Engineer, Albany, for the State Highway Commission.

Arthur B. Lamphier, 86 State street, Albany, its Corporation Counsel for the City of Rensselaer.

Ernest L. Boothby, First National Bank Building, Albany, as attorney for James J. Rigney, property owner, who also appears in person.

VAN NAMEE, Commissioner:

In 1910 a bridge was built under an agreement between the City of Rensselaer and The New York Central and Hudson River Railroad Company carrying the so called Columbia turnpike over the main line tracks of the New York Central within the limits of the city of Rensselaer. This turnpike is at present on the main automobile route between Albany and New York on the east side of the Hudson river, and is part of the main route between Albany and Boston and New England points. The structure in question replaced a then existing bridge constructed before the enactment of the present grade crossing law, and was designed for the concentrated load caused by a $10\frac{1}{3}$ ton roller and a uniform loading of 100 pounds per square foot of roadway and 80 pounds per square foot of sidewalk. It is posted for 8 tons which is its figured capacity based on modern motor truck construction.

The New York Central Railroad Company under section 91 of the Railroad Law now brings a petition alleging that public safety requires that the existing bridge shall be changed and that an alteration in the existing structure be made so as to allow loaded automobile trucks weighing 15 tons to cross such bridge in safety.

Under the agreement by which the now existing bridge was constructed, dated March 1, 1910, the Railroad company agreed to construct the bridge and approaches and to maintain the bridge structure, and the city to maintain the approaches. The Columbia turnpike has become a part of the state highway system since the construction of this bridge. The company has maintained the bridge structure in the strength as originally designed, but the evidence shows that it is not now sufficient to carry the present heavy traffic due to the heavily concentrated loads of the modern motor truck.

Hearings were had before Commissioner Van Namee on June 9 and June 28, 1920, at which time evidence was intro-

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duced showing that on the 1st, 2nd, and 3rd days of June, 1920, between the hours of 7 a. m. and 7 p. m. there was an average traffic over this bridge of 1161 automobiles, of which 72 were motor trucks, many of which, loaded, weighed as high as 15 tons. The evidence shows that the company has endeavored to maintain the bridge in the condition in which it was originally built, but that it has experienced trouble on account of the breaking of the stringers in the flooring system. It seems clear that public safety requires that the bridge be strengthened to take care of the modern traffic. It is proposed to do this by doubling the present single wooden floor stringers, riveting additional cover plates to the steel floor beams, and by additional splice plates on the trusses. The Railroad submitted a plan covering the details of this alteration and the strengthening of the present structure. The cost is estimated at \$15,000.

The petition was filed under section 91 of the Railroad Law. The question now arises as to where the burden of paying the cost of the needed alterations rests. The Railroad admits its liability for one-half of the amount. The Highway Commission disclaims any liability on the ground that section 172-A of the Highway Law provides where highways are built through cities that the Highway Commission shall retain jurisdiction and authority over any such street heretofore improved as a state or county highway until the termination of the guaranty period covered by the bond on such construction when the Commission is required to notify the city clerk of any such city, and upon the service of such notice the authority and responsibility of the State over such streets ceases, and thereafter such streets shall be maintained in the manner provided by law for the maintenance and repair of city streets. The guaranty period in this case has elapsed, the required notice has been served, and this roadway is at present a part of the city street system of Rensselaer.

The counsel for the City of Rensselaer contended that the city is not liable in any manner whatsoever for any expense incidental to the upkeep of this bridge; that under the contract of 1910 between the New York Central and Hudson River Railroad Company and the City of Rensselaer the Railroad should build this bridge and maintain it; that this was an obligation placed upon the company prior to the enactment of section 91 of the Railroad Law, and that it was not the intention of the Legislature by the enactment of that section or amendments thereto to shift the burden of the expense from the Railroad company partially upon the State and partially upon the city, and that neither subdivision 3 nor subdivision 4 of section 94 applied in this case; that the petition should not have been brought by the Railroad under section 91 of the Railroad Law, but that section 93 applies and in short that the Railroad should pay the whole cost of any alterations needed in this bridge.

An examination of the authorities convinces me that the petition of the Railroad in this matter brought under section 91 of the Railroad Law is proper and that the expense should be divided as provided by subdivision 3 of section 94 of that law: one-half to the Railroad company, one-quarter to the municipality, and one-quarter to the State through the grade crossing fund of the Public Service Commission. The law seems clear upon this point.

Since this bridge and roadway were built in 1910 by the operation of 172-A of the Highway Law the structure and the roadway and its approaches have ceased to be part of the State Highway system, and have become part of the street system of the city; and the city is obliged to bear its share of this change unless the agreement between itself and the Railroad relieves it of this burden. This agreement, by which the maintenance of the structure was accepted by the Railroad company, clearly refers to the maintenance of the present structure and not to an alteration or changing such as is here proposed. Paragraph 2 of the agreement says that all

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work done by the Railroad company "in connection with the roadway, renewal or maintenance thereof, shall be done at the expense and risk of the party of the second part without expense to the party of the first part". Again in paragraph 4 the Railroad company agrees to indemnify the city from any loss or damage by reason of the "construction, repair, renewal, maintenance or use of the said work".

The evidence shows that the company has repaired, renewed, and still maintains the bridge in a condition ample to meet the requirements of the traffic that it was originally constructed to bear, but what is needed here is a changing or alteration of the existing structure to meet new conditions not contemplated at the time of construction. It would therefore seem that the structure and roadway, being a part of the street system of the city of Rensselaer, and the changes desired being an alteration of the existing structure and not merely maintenance and repair, the cost should be divided as provided by subdivision 3 of section 94 unless the petition of the Railroad company is not properly brought under section 91.

Some consideration must here be given to the history of the grade crossing elimination provisions of the Railroad Law. Under section 93, the duty of the Railroad to maintain the frame work of the bridge and its abutments and keep them in repair is unquestioned and the Railroad does not here contend otherwise. The purpose of this petition is not repair or maintenance; it is an alteration of an existing structure which is not worn out but which is inadequate to meet the demands of present day traffic. This proceeding is brought by the Railroad under section 91, which section has been materially amended since the completion of the present structure in question and the enactment of the Railroad Law as chapter 49 of the Consolidated Laws by chapter 481 of the laws of 1910.

On March 8, 1912, this Commission, *In the Matter of the Town Board of Newstead and President and Board of Trus-*

tees of the Village of Akron, v. The New York Central and Hudson River Railroad Company as to reconstruction of Buell street overhead bridge crossing in said village reported in Volume 3 of Public Service Commission Reports, Second District, page 250, held that section 91 as it then stood did not give to the Commission power to order the demolition of the existing bridge which had become inadequate to meet the increased traffic, and the construction of a new steel bridge of a larger dimension. Chairman Stevens in his opinion said:

The theory of the grade crossing elimination law as it now stands seems to be that when a structure is once ordered for the purpose of an elimination, that identical structure shall forever remain, being maintained in proper condition, however, by the Railroad company. There is an obvious defect in the law in cases where the growth of traffic has made the structure once ordered inadequate and insufficient to accommodate the public travel. This should be corrected by legislation, but it is obvious that we can now make no enforceable order which would require anybody to pay the expense of carrying out its provisions.

To require the Railroad company to repair the existing bridge does not meet the situation.

This Commission, therefore, recommends proper legislation which will enable it to deal adequately with the situation herein presented.

Section 91 was amended in 1914 by chapter 378 of the laws of that year with the evident intention of correcting this defect by inserting the words "below or above grade by structures heretofore constructed" and adding to the conditions under which the petition could be brought by the city, town, county, or Railroad company a condition requiring "a change in the existing structure by which such crossing is made".

This construction of the statute was followed by Judge Philbin, *In the Matter of New York*, 105 Misc. 659, decided in January, 1919. In this case the petitioner, the City of New York, asked for a writ of peremptory mandamus directing The New York Central Railroad Company to repair the frame work of the bridge carrying Morris avenue over the tracks of the Railroad company at 156th street in such city.

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The application was made under section 93 of the Railroad Law. The Railroad objected to the issuance of the writ on the ground that the petition called for an alteration and changing of the existing structure, and therefore should not be brought under section 93 but under section 91. The court denied the application of the city, saying the Railroad company was not, under section 93, required to do more than to bring the bridge to the standard of efficiency it had when originally constructed. "It is not bound, for example, to strengthen the structure so as to meet the exigencies of the present traffic which is shown to have largely exceeded that which reasonably could have been contemplated at the time that the bridge was erected in the year 1890".

The evidence in this case, therefore, clearly showing that public safety requires an alteration or changing of the existing structure, and it being determined that such structure is within the bounds of a municipality, and that the petition is properly brought under section 91 of the Railroad Law, an order should be made determining the alterations and changes aforesaid to be necessary and ordering them made, the cost of which should be borne as provided in subdivision 3 of section 94, namely, 50 per cent by the Railroad corporation, 25 per cent by the Municipal corporation and 25 per cent by the State.

All concur.

Petition of ERNEST C. HUBBARD under chapter 667, laws of 1915, and chapter 307, laws of 1919, for a certificate of public convenience and necessity for the operation of a stage route by auto buses in the incorporated village of Massena, St. Lawrence county, it being proposed that the route shall also be operated to Massena Springs. [Case No. 7641.]

Transportation Corporations Law. Where an incorporated village has brought itself within the provisions of the Transportation Corporations Law relating to auto buses and has granted a license for operation to a certain applicant and refused others, this Commission, upon the hearing for a certificate of convenience and necessity by such licensee, can not admit evidence of the necessity of bus lines proposed to be operated by applicants rejected by the village board. It can only pass upon the convenience and necessity of the line proposed to be operated by the applicant before it.

Mandamus. The granting or withholding of a license to operate an auto bus line by a village board is a matter involving the exercise of judgment and discretion. The writ of mandamus can not be invoked to compel such board to exercise its judgment and discretion in favor of a particular applicant.

Decided August 24, 1920.

Appearances:

John C. Crapser (by Mr. O'Neil), Massena, for petitioner.

H. Benjamin Chase, Massena, attorney for George Reddick and others, in opposition.

Andrew J. Hammer, Massena, attorney for Village of Massena.

VAN NAMEE, Commissioner:

The incorporated village of Massena, situated in the northerly part of St. Lawrence county, is a rapidly growing

center of about ten thousand population. A part of the village is known as Massena Springs, and is the portion which was first settled but it is wholly within the incorporated limits of the village of Massena.

Just outside the village boundary of Massena is situated the plant of the Aluminum Company of America which employs approximately four thousand men and upon which at present the prosperity of the village largely depends. There is no street car system in Massena, and the only public conveyance has been by means of buses or taxicabs licensed under the village law by the board of trustees of the village. These operated between all points in Massena, Massena Springs, and the Aluminum Company's plant. The fare varied but was never less than 15 cents for a trip from any one point to another point. It is not apparent from the evidence whether any of these lines ran on regular schedule. Different people or firms operated these buses and taxicabs, among them being the petitioner.

On March 31, 1920, the board of trustees of the Village of Massena, by resolution, placed the village under the provisions of section 26 of the Transportation Corporations Law as amended by chapter 307 of the laws of 1919. Shortly thereafter the petitioner applied for consent for operation of an auto bus line in and along certain public streets in the village. Notice of public hearing on this application was duly given, and the hearing was held on the 27th day of April, 1920. The board thereafter granted a consent to said Hubbard for such operation under certain conditions, with all of which it was shown by the evidence he has substantially complied.

On the 18th day of June, 1920, Hubbard applied to this Commission for a certificate of public convenience and necessity, which brings this matter before us. In the meantime, several other operators of taxicabs in Massena, under village license, applied to the board for a consent similar to that given Hubbard, but all have been refused.

The hearings were held before Commissioner Van Namee at Massena on July 26 and August 14, 1920. It was shown that no street car line exists in the village; that the distance from the railroad station to the business section is approximately one mile; and that numbers of employees of the Aluminum Company live from one to two miles from the works and are accommodated by the proposed line.

The petitioner has now five buses in operation carrying from sixteen to twenty passengers, and two more are nearing completion. No evidence was introduced to show the absence of the necessity for the operation of a bus line. All witnesses agreed some line was both a convenience and a necessity. The objection raised by Mr. Chase was not as to the operation of the line, but the confining of the consent of the village to this petitioner.

Before these proceedings were begun Mr. Chase, as attorney for George Reddick, applied to the Supreme Court for a peremptory writ of mandamus to direct the village board to issue and deliver to said Reddick a village license to operate auto buses in the village. About July 28th Judge Van Kirk denied this application on the ground that the issuance of such a license was a matter involving the exercise of judgment and discretion, and that it did not appear that there was any abuse of authority, nor was it the function of the writ of mandamus to require that the exercise of an action involving discretion and judgment be exercised in a particular way. Substantially, then, the objection raised against the granting of this certificate was not that public convenience and necessity would not be served by its operation, but that they would be better served by the operation of more bus lines.

It was held by the sitting Commissioner that evidence to this effect could not be admitted in this hearing. The village had put itself under the provisions of the law, and after due notice had given its consent to the operation of a bus line to one certain person. It being determined from the

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evidence that the operation of such bus line would serve public convenience and necessity, no further issue remained to be decided.

If and when the village board grants further consents to operations which may or may not parallel the line to be conducted by Hubbard, then the question of the necessity for additional lines will be before the Commission, and on such proceeding decided. It being shown that public convenience and necessity exists for the operation of such line, an order should be entered allowing the operation under and subject to the provisions of the consent granted by the board of trustees of the Village of Massena to Ernest C. Hubbard.

All concur.

In the Matter of the Complaint of RESIDENTS OF THE INCORPORATED VILLAGE OF FORT EDWARD AND OF THE TOWN OF FORT EDWARD, Washington county, and others, *against* UNITED STATES RAILROAD ADMINISTRATION, DELAWARE AND HUDSON RAILROAD, asking that a bridge of the railroad across the Hudson river be raised. [Case No. 7104.]

This Commission has jurisdiction, which it should exercise in a proper case, to compel a railroad company to elevate a bridge constructed by it over a navigable stream to a height sufficient not to interfere with navigation.

Decided August 26, 1920.

Appearances:

W. S. Bascom, Fort Edward, as attorney for the Village of Fort Edward.

Erskine C. Rogers, Hudson Falls, attorney for the Village of Fort Edward and Town of Fort Edward.

Willard Robinson, as President of the Village of Fort Edward, and also representing the Town Board of the Town of Fort Edward.

Fred McNaughton as President; *A. H. Bunnell* as Secretary; *C. W. Montgomery*, *Thomas C. Loughlin*, and *C. W. Bowtell* as members of the Commercial Association of Fort Edward.

John McMahon, 146 Broadway, Fort Edward, and *W. B. Waston*, Fort Edward, in person.

J. S. Vaughn, Supervisor of the Town of Fort Edward.

Edgar Hull, Fort Edward, as attorney for the International Paper Company.

Daniel T. McCormick, Fort Edward, as superintendent of the International Paper Company.

James McPhillips, Glens Falls, *Lewis E. Carr* and *Newton R. Cass*, Albany, as attorneys for United States Rail-

road Administration, Delaware and Hudson Railroad, and The Delaware and Hudson Company.

Roy G. Finch for the State Engineer.

Anson Getman, Albany, Deputy Attorney General, for the Attorney General, representing the Canal Board, State Engineer, and Superintendent of Public Works.

Edward S. Walsh, Superintendent of Public Works, State of New York, Albany.

KELLOGG, Commissioner:

The predecessor in interest of The Delaware and Hudson Company many years ago constructed a railroad bridge across the Hudson river at Fort Edward. The statute then in effect (chapter 249 of the laws of 1834), as does the statute now, provided that it should restore the stream to its former state in sufficient manner as not to impair its usefulness. That portion of the river crossed by this structure came within the improvement of the canal system of the State pursuant to chapter 746 of the laws of 1911.

A Barge Canal terminal was constructed directly upstream from the bridge, to approach which it was necessary to pass under the bridge in question. The Barge Canal Law, chapter 147 of the laws of 1903, provides for a clearance beneath all bridges of $15\frac{1}{2}$ feet, and unless such bridges are maintained at such clearance navigation of vessels designed for transportation on the Barge Canal is not possible. Those constructed requiring a clearance of the amount provided by statute are not able to pass under this bridge, and are not able to use the terminal which serves a large population in the neighboring vicinity. Complaint was made of this condition in this case by various residents of the village.

Upon the first hearing had upon this the Railroad company immediately raised the question of jurisdiction. It was conceded that the Canal Board might act in the premises and had authority to direct the raising of the bridge to a proper elevation. Hearings before this Commission were

suspended in order that an application might be made to the Canal Board. That body finally declined to act, for the reason that the appropriations for Barge Canal terminals was so far exhausted as to exclude this expenditure, the State being liable under the authorities for the expense incurred by the Railroad company in altering its bridge so as to provide the necessary clearance.

This question of jurisdiction was submitted with a memorandum to the entire Commission by the sitting Commissioner for its ruling. At a meeting held June 15, 1920, the Commission made the following ruling:

"Commissioner Kellogg's memorandum was considered, and its proposed ruling upholding the jurisdiction of the Commission was approved."

This memorandum thus approved was as follows:

This is an application to this Commission by certain residents of Fort Edward for an order requiring The Delaware and Hudson Company to raise its bridge crossing the Hudson river at that village.

The Barge Canal Referendum Act, chapter 147 of the laws of 1903, provided for the improvement of the Champlain Canal by the canalizing of the upper Hudson river from Waterford to near Fort Edward, thence by excavating an artificial channel along the route of the former Champlain Canal to Lake Champlain, near Whitehall.

The act further provided that "new bridges shall be built over the canals to take the place of existing bridges wherever required," and that bridges should give a free passage-way not less than 15½ feet between the bridge and the water at its highest ordinary navigable stage.

The point at which the canalized river bed joins the artificial channel extending to Lake Champlain is in the lower part of Fort Edward.

The Barge Canal Terminal Referendum Act, chapter 746 of the laws of 1911, provided for the construction of the canal terminals at certain places, including Fort Edward.

The procedure provided by the statute was followed and a terminal was constructed at that point. It is slightly farther up the river and to the north from the northerly end of the canalized part of the Hudson river already referred to. It is across this section of the river, connecting the terminal with the main body of the canal, that the span of the bridge in question extends.

The elevation at that level has been somewhat raised by placing flash-boards upon the dam at Crocker's Reef, at the southerly end of

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the level, but on account of insufficient depth of the water, it appears that even without such flash-boards the clearance beneath the bridge would be less than the 15½ feet provided by chapter 147 of the laws of 1903, which I think must be extended to cover terminals of the improved canal under the laws of 1911, and forming a part of it.

Upon the first hearing the Railroad company raised the question of jurisdiction of this Commission, claiming that it has no power to act in the matter, and that the Canal Board alone could direct the elevation of the bridge.

An adjournment was had for the purpose of determining this question, and pending such adjournment, one of the applicants made request to have the Canal Board, the State Engineer, and the State Superintendent of Public Works made parties to this proceeding.

At a subsequent hearing, inasmuch as the jurisdiction of the Canal Board was conceded and our jurisdiction was questioned, I suggested that application should be made to the Canal Board, for relief in the matter. In this way the situation might be remedied and the Railroad company have a claim against the State for the cost of the change under the decisions. This application was made to the Canal Board shortly after the hearing in January, 1920, but has only of late been disposed of by that Board.

Upon the advice of the Attorney General, the Canal Board has declined to act, for the reason that there are now no funds available for further construction on the Barge Canal terminals, the avails of the bond issues being practically exhausted.

In response to a request for information, the Superintendent of Public Works advises as follows:

Referring to the matter of the bridge maintained by The Delaware and Hudson Company over the canal channel at Fort Edward, I beg to say —

This bridge spans that part of the improved Champlain Canal which provides an entrance to the Barge Canal terminal which has been constructed by the State at Fort Edward. The clear passage-way between the bridge and the surface of the water ranges from 13 feet to 14 feet, dependent upon the elevation of the water's surface. As you are aware, section 3 of chapter 147 of the laws of 1903, known as the Barge Canal Construction Act, requires that all bridges "shall give a clear passage-way of not less than 15½ feet between the bridge and the water at its highest ordinary navigable stage".

The presence of a bridge at this point, with less than the statutory clearance, constitutes an obstacle to the use of the Barge Canal terminal at Fort Edward by boats which may navigate the main channel of the improved canal. Within the past few days evidence has been presented to me which leads me to believe that even boats of the ordinary canal type are unable to reach the terminal on account of the inadequate clearance under the bridge. In one case, it appears that an important industrial plant in the vicinity was compelled to transport

its freight by trucks for a considerable distance from the factory to a canal barge. Had the bridge been of the required clearance, the boat would have proceeded conveniently to the terminal.

In my opinion, as the situation now exists, the canal terminal at Fort Edward can not be utilized for the purposes for which it was constructed until the clearance referred to in the statute is provided under the bridge.

We therefore have a situation where the free navigability of the Hudson river as canalized and improved is impeded by this structure, and a question of jurisdiction is raised. Inasmuch as this question is vital and underlies the whole proceeding, which if determined adversely to the complainants will dispose of the matter, and if disposed of favorably to the complainants will probably be reviewed in the courts, by the Railroad company, I would like to have the opinion of my associates on the Commission in the matter, briefly submitting my own views for consideration.

That the upper Hudson above tidewater is a navigable stream has been uniformly held by the courts. A late decision to that effect, in which previous decisions were cited, is *West Virginia Pulp and Paper Company of Delaware v. Duncan W. Peck*, 189 App. Div. 286.

The predecessors in interest of the Railroad company constructed this bridge lawfully, under the provisions of chapter 249 of the laws of 1834 —

Sec. 13. Whenever it shall be necessary for the construction of their single or double railroad or way, to intersect or cross any stream of water or watercourses . . . it shall be lawful for the said corporation to construct their single or double railroad or way across . . . the same; but *the corporation shall restore the stream or watercourses . . . to its former state, or in a sufficient manner not to have impaired its usefulness.*

A similar right was granted by subdivision 5 of section 28 of chapter 140 of the laws of 1850.

This provision was substantially reënacted in section 21 of the present Railroad Law, which contains this provision —

Every railroad corporation which shall build its road along, across or upon any stream, watercourse, street, highway, plankroad or turnpike, which the route of its road shall intersect or touch, shall restore the stream or watercourse, street, highway, plankroad and turnpike, thus intersected or touched, to its former state, or *to such state as not to have unnecessarily impaired its usefulness*, and any such highway, turnpike or plankroad may be carried by it, under or over its track, as may be found most expedient.

The Railroad company contends that having once complied with the statute its full duty is discharged, and that it has no continuing obligation to protect the navigability of the stream as conditions change.

The decisions of the courts in somewhat similar cases seem to be to

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the contrary. The above quoted section of the Railroad Law, it will be noted, refers to both highway and navigable streams. They are on exactly the same footing.

In *Hatch v. Syracuse, B. & N. Y. R. R. Co.*, 50 Hun 64, it was held:—

Under the statute, railroads are required to restore highways to their former state of usefulness, and to preserve them in such state. *The duty is a continuous one.* (*People v. N. Y. C. & H. R. R. Co.*, 74 N. Y. 302, 306; *People v. N. Y., N. H. & H. R. R. Co.*, 89 *id.* 286).

If by an increase of business on highways, the facilities first provided become inadequate, the corporation must make such changes as are reasonably necessary to provide for the needs of the public. (*Cooke v. Boston and Lowell R. R.*, 133 Mass. 185; *Burritt v. City of New Haven*, 42 Conn. 174; *Manley v. The St. Helens C. & R. Co.*, 2 H. & N. 840; 2 Wood R. R. 979; see also the remarks in *People v. N. Y., N. H. & H. R. R. Co.*, 89 N. Y. 270).

It was further held in *Windsor v. Delaware and Hudson Canal Company*, 92 Hun 127 (Affd. 155 N. Y. 645, on the opinion of the Court below), that where it appears that the original construction is not sufficient, a long lapse of time will not relieve the defendant of the duty to provide a sufficient passage-way for traffic under this bridge.

Both of these decisions, as it has been stated, were as to highways, but the same section of the statute covers navigable streams.

The right of the State to improve its navigable streams is paramount. Any license or permission that might have been given the railroad company to cross its streams was at all times subject to the primary right of the State to improve navigation.

The right of a railroad company where it has constructed a bridge which crosses a navigable stream was considered by the courts in *Lehigh Valley Railroad Co. v. Canal Board*, 146 App. Div. 151, Affd. 204 N. Y. 471. In this case it was held that the State had the right to require the alteration or removal of a bridge interfering with navigation, but that by virtue of the Barge Canal Act, the railroad company was entitled to be reimbursed therefor, for the reason that the provisions of such act, as construed by the court, expressly so provided at least to the extent of funds appropriated therefor.

The right of the State to control its navigable streams, and to preserve them for the benefit of the public at large, can not be granted away even by the Legislature itself; and even where such grant is made, control thereof may be resumed by the State. In *Matter of Long Sault Dev. Co.*, 212 N. Y. 1, affirmed by the United States Supreme Court in *Long Sault Dev. Co. v. Call*, 242 U. S. 272.

It would seem, therefore, that the duty rests with the Railroad company to at all times so maintain its bridge as not to interfere with navigation, and it must adapt itself to non-interference with such navigation as it develops and increases.

The question remains whether this Commission has power to compel action by the Railroad company. Section 50 of the Public Service Commissions Law provides —

If in the judgment of the Commission having jurisdiction additional tracks, switches, terminals or terminal facilities, stations, motive power, or any other property, construction, apparatus, equipment, facilities or device for use by any common carrier, railroad corporation or street railroad corporation in or in connection with the transportation of passengers or property ought reasonably to be provided or any repairs or improvements to or changes in any thereof in use ought reasonably to be made, *or any additions or changes in construction should reasonably be made thereto in order to promote the security or convenience of the public*, or employees, or in order to secure adequate service, or facilities for the transportation of passengers or property, the commission shall, after a hearing either on its own motion or after complaint, make and serve an order directing such repairs, improvements, changes or additions to be made within a reasonable time, and in a manner to be specified therein, and every common carrier, railroad corporation and street railroad corporation is hereby required and directed to make all repairs, improvements, changes and additions required of it by any order of the commission served upon it.

It is claimed in behalf of the Railroad company that this merely refers to transportation matters, and "the security or convenience of the public" referred to is the traveling public. There is some force in this suggestion in view of the context.

Section 57, however, seems to be more unquestionably applicable. It provides —

Whenever either commission shall be of opinion that a common carrier, railroad corporation or street railroad corporation subject to its supervision is failing or omitting or about to fail or omit to do anything required of it by law or by order of the commission, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the commission, it shall direct counsel to the commission to commence an action or proceeding in the supreme court of the state of New York in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction.

By maintaining this bridge, interfering with the full navigation of the Hudson river, in its improved canalized form, the Railroad company is acting in violation of law, and such bridge should be heightened so as to permit free navigation thereunder. And whatever may be said about section 50, section 57 would seem to quite clearly cover the case.

If, as is suggested, this Commission has power to direct the raising of the bridge, it may be that, under the decision of the *Lehigh Valley* case, the Railroad company would have a claim against the State for its expenditure in making the necessary changes, and if current funds

available are exhausted, a duty might rest upon the Legislature to make further appropriation.

I am very anxious to get the views of the other Commissioners on this subject before ruling on the question, which will probably be decisive in the case. If in their opinion I am in error in this regard, I wish to make a ruling in conformity with their views. In this way valuable time may be saved and further hearings rendered unnecessary. If in the opinion of a majority of the Commission we are without jurisdiction, decision should be made accordingly at this stage of the proceedings.

Following the approval of this memorandum by the Commission, a further hearing was held, and at this hearing the ruling of the Commission on the jurisdictional question was announced, as follows:

The Commission holds that it has jurisdiction to entertain this proceeding.

When the Railroad company constructed this bridge across the Hudson river, a navigable stream, the duty was imposed upon it by chapter 240 of the laws of 1834, then in effect, to restore the stream to its former state in sufficient manner not to have impaired its usefulness. This provision of law has been continued through a series of reenactments until it now appears in section 21 of the present Railroad Law.

This duty was not discharged by simply constructing a bridge with sufficient clearance to accommodate navigation on the river at that time, but it was a continuing duty, and as navigation increased it became the duty of the Railroad company to maintain this bridge in such form as not to interfere with or obstruct such increasing navigation.

This has been expressly held under the same section as to land highways. (*Hatch v. Syracuse, B. & N. Y. R. R. Co.*, 50 Hun 64.) The same principle must necessarily apply to water highways.

Where the original bridge was inadequate, the lapse of time will not destroy the duty of the Railroad company to provide an adequate passage-way. (*Windsor v. Delaware and Hudson Canal Company*, 92 Hun 127, Affd. 155 N. Y. 645, on the opinion of the court below.)

The general subject of the crossing of highways and navigable streams by railroads is vested in the Public Service Commissions of the State. Where, therefore, a railroad is impairing the full use of a water highway, contrary to the provisions of law, it becomes the duty of this Commission to terminate such violation. This proceeding, therefore, should be entertained by the Commission.

The principles involved are stated in the memorandum

and in the ruling and need not further be referred to. Upon the hearing, further evidence was presented substantiating the facts set forth in a letter of the Superintendent of Public Works, which was placed in evidence. The obstruction of the stream by the bridge in question is most manifest. The consequent impairment of the usefulness of this terminal upon which \$200,000 has been expended has been shown. Some of this amount was contributed by a local industry to whom the terminal was a benefit.

For the reasons stated, an order should be entered directing the Railroad company to elevate its bridge so as to provide a clearance thereunder over the barge canal channel of 15½ feet, directing the work to commence forthwith and to progress with reasonable celerity to a completion.

Inasmuch as the Railroad company has indicated an intention to review this decision, the order should contain a provision under the statute requiring it to state within a reasonable time, say ten days after service, its intention as to compliance with the order, and unless steps are taken promptly to comply with the order or to review this decision, application should be made to the court, under section 57 of the Public Service Commissions Law, to prevent continuance of this violation of law. It is important that if this improvement is to be made at all, it should be made before the opening of another season of navigation.

All concur.

No. 536:529

Petition of THE NEW YORK CENTRAL RAILROAD COMPANY under section 91, Railroad Law, for an order determining that a new highway bridge shall be constructed across the West Shore railroad (lessor) near Malden-on-Hudson, in the town of Saugerties, Ulster county, in place of the existing bridge. [Case No. 7469.]

Railroad Law, section 91; Repairs to Existing Structures. Where increased traffic and weight of vehicles have made an existing bridge over a railroad unsafe, even though such bridge has been originally constructed and maintained solely at the expense of the Railroad company, the cost of the alterations and strengthening is assessable under section 91 and not under section 93 of the Railroad Law.

The Commission does not have to determine whether there are funds available to defray the expenses of such change, either on the part of the Railroad or on the part of the State Commission of Highways. The necessity of the change in the crossing may be determined even though money for the State's portion of it is not available.

Decided August 24, 1920.

Appearances:

Amos Van Etten, Kingston, for the petitioner.

John W. Eckert, Kingston, for the County of Ulster.

John H. Huber, Assistant to First Deputy, and *Frank Hermans*, Engineer of Grade Crossings, Albany, for the State Commission of Highways.

G. A. Van Noren, Grade Crossing Engineer, The New York Central Railroad Company.

Henry C. Henderson, Deputy Attorney General, for the State Commission of Highways.

VAN NAMEE, Commissioner:

On March 22, 1920, The New York Central Railroad Company petitioned, under section 91 of the Railroad Law, for an order determining that a new highway bridge be constructed across the West Shore railroad near Malden-on-Hudson, in the town of Saugerties, Ulster county, in place

of the existing bridge. The present bridge consists of two wooden Howe truss spans of about 34 feet 6 inches and 42 feet respectively, supported on masonry abutments and a timber bent. It has a clear width of roadway of 14 feet 3½ inches and an under-clearance of 17 feet. The bridge was originally built in 1882, when the railroad was built, crossing the then existing highway, and the cost was borne wholly by the railroad company as provided by statute. It was repaired in 1918 at the expense of the railroad. It has now its original strength which gives it a figured capacity for trucks weighing four tons loaded. The highway itself has since the building of the original bridge been improved and is now state highway No. 5169, a part of the main trunk line highway north and south on the west shore of the Hudson river. Very heavy traffic passes over the road.

On April 29 and 30, 1920, 168 pleasure automobiles, 14 motor buses, and 34 motor trucks, some of them weighing from eight to ten tons, were counted crossing the bridge. This overloading of the bridge and its narrowness constitutes a menace to the safety of the public. The railroad company had prepared plans consisting of a new steel plate girder bridge of one 107-foot main span and one 40-foot approach span on the north side, designed to carry 15 tons, with a clear width of roadway of 20 feet. The under-clearance is to be 22 feet. The cost will be approximately \$70,000.

The railroad contends the cost of this improvement should be borne, one-half by it and one-half by the State, as provided by subdivision 4 of section 94 of the Railroad Law. The town or county is not interested, this being on a state highway.

At the hearings which were held at Kingston on May 3, and at the office of the Commission in Albany on May 24, 1920, the Highway Commission agreed that the petition was properly brought under section 91, and that the cost should be borne one-half by the railroad company and one-

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half by the State through funds appropriated to the Highway Commission under subdivision 4 of section 94 of the Railroad Law.

The question of whether an alteration or a changing of an existing crossing which was originally constructed at the expense of the railroad should be brought under section 91 of the Railroad Law, in which case the railroad pays one-half of the expense, or whether under section 93 the railroad could be compelled to bear the whole expense of such alteration or change, was determined by the Commission on the 24th day of August, 1920, in case No. 7535, involving the alteration of an existing bridge on the Columbia turnpike in the city of Rensselaer. It was held in that case that the petition was properly brought under section 91, and section 93 of the Railroad Law did not apply.

The Highway Commission further took the position that this state highway was paid for out of the bond money raised for construction of state highways; that this money was apportioned to the various counties of the State, and that the share of Ulster county, in which this highway and bridge are situated, has been spent, and the Commission, therefore, has no funds available for construction of new highway; that the only work that can be done in the county of Ulster by the Highway Commission is repairs and maintenance of existing highways, and that this is not a repair or maintenance but the building of a new structure. Therefore, the Highway Department, while it does not object to an order, has no way of paying its share of this expense. It admits its liability, but unless the law is changed it can see no way of paying its proportion.

This Commission does not have to determine whether there are funds available to defray the expenses of this change either on the part of the railroad or on the part of the State Commission of Highways. The necessity of change in the crossing may be determined even though money for the State's portion of it is not available. (Report

of the Attorney General, 1904, page 248.) If the Highway Commission has not money available for new construction in Ulster county, under the Highway Bond issue, an appropriation for this purpose may be obtained from the Legislature.

It appearing clearly from the evidence that public safety demands an alteration and change in the existing structure by which the crossing in this case is made, an order to that effect should be entered determining that the change petitioned for is necessary, and providing further that the expense thereof should be equally divided between the State and the railroad company under subdivision 4 of section 94 of the Railroad Law.

All concur.

Petition or Complaint of GENEVA, SENECA FALLS AND AUBURN RAILROAD COMPANY, INC., under subdivision 1, section 49, Public Service Commissions Law, and section 181, Railroad Law, for permission to increase passenger fares, and to put in new tariff on short notice. [Case No. 7525.]

Operations of Geneva, Seneca Falls and Auburn Railroad Company, Inc., again examined and the rate of 8 cents in each zone authorized, the city of Geneva and the short outlying stretch of road constituting one of the zones.

Decided September 2, 1920.

Appearances:

George S. Stubbs, Mayor, for the City of Geneva.

Michael F. Tracy, representative of the Geneva Federation of Labor.

Lansing G. Hoskins, 541 Exchange street, Geneva, as attorney for petitioner.

Richard R. Quay, Pittsburgh, Penna., as president of petitioner.

Vincent S. Welch, Geneva, as secretary of Geneva Chamber of Commerce.

IRVINE, Commissioner:

The Geneva, Seneca Falls and Auburn Railroad Company, Inc., seeks to make a further increase in its passenger fares. Rates on different portions of this system have been frequently before the Commission (see cases Nos. 5488, 5761, 6081, 6922). In three of these cases Opinions have been printed: VI P. S. C. Rep. 151; VII P. S. C. Rep. 160; VIII P. S. C. Rep. 403. With this basis it is unnecessary to describe anew the system of the company or its method of operation. While it is in a sense unfortunate

that there have been so many rate readjustments, the company can not be criticized, because it has sought only moderate increases from time to time as operating costs have advanced, and has never sought to anticipate future cost increases.

The existing rate schedule is somewhat complicated. The rate in the city of Geneva is 6 cents. On the interurban zones the zone rate on each is 7 cents, with 13 cents for two zones, 20 cents for three, 26 cents for four, etc. There is also an eccentric zone terminating at the coke works, about one-half mile west of the fixed zone ending at Lake Road. This was established to meet the wants of workers in the coke plant by giving them the city fare of 6 cents to that point, to Lake Road being 7 cents. This application seeks an 8 cent fare in the city of Geneva and an 8 cent fare in each of the interurban zones. Certain book tickets are sought to be increased to a 7 cent basis; and five tickets are to be sold for 35 cents, each good for payment of an 8 cent cash fare. Under this rate the cash fare to the coke works would be 8 cents, and to Lake Road 8 cents; the ticket fare to each would be 7 cents, the same as the present cash fare. The coke works zone is, therefore, to be abolished. Certain excursion tickets have been sold in the Summer to Cayuga Lake Park. As noted in the last Opinion, Cayuga Lake Park is no longer maintained as a summer resort. It is proposed to abolish these excursion tickets which seem to have no further purpose.

As a result of the last interurban increase, the Commission expressed a doubt as to whether it would be sufficient, and made a positive statement that it would not more than enable the company to continue its operations, maintain its property, and pay its interest and taxes. From what follows it will be seen that it has not been sufficient for that purpose. Although the 1919 statistics reflect only about three months of operations under the present rates, the deficit of \$11,744 in 1919 could not possibly have been overcome had the present rates

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been in force during all of that year. This appears clearly in the table that follows, containing an estimate of operations for a twelve month period under the proposed tariffs.

Before stating the figures in detail it should be said that the operating expenses have again been closely scrutinized, and have been found in nowise excessive in view of known conditions as to the cost of labor and supplies and the expenses of comparable systems brought to the attention of the Commission by investigations and by their annual reports. In one of the previous cases attention was paid to the charges made for depreciation. Until 1917 these were purely nominal. In 1916 there was charged only 0.27 per cent on investment in ways and structures, and 0.10 per cent on investment in equipment. These charges being only nominal gave an artificial appearance of comparative prosperity not based on the actual condition of the property. Beginning in 1917, charges were made of 3.05 per cent on ways and structures, and 4.90 per cent on equipment. This gave to the operating expenses in 1917 the appearance of a sudden and over-large increase, but the amounts charged are within the recommendations of the Commission in such cases and are not more than reasonably necessary for the permanent preservation of the property. Following is a condensed statement of operating results in 1917, 1918, and 1919, together with an estimate of such results for a twelve month period under the proposed tariffs.

In estimating the revenues two assumptions have been made for which no high degree of accuracy can be claimed. No allowance has been made for a decrease in interurban passengers because of the increase in rates, while it has been assumed that there would be a decrease of 16 per cent in Geneva city passengers. It has further been assumed that with the reduced rates for tickets, 70 per cent would use tickets and only 30 per cent pay cash fares. These factors are, of course, from their very nature decidedly uncertain. In view of the character of the travel, little of it being transient,

it is not thought that the proportion of ticket fares is over-estimated. It may be that the diminution in city travel will not be so great as estimated, but it is equally probable that there will be some diminution in interurban travel. In any event it is not thought that the increase in revenue can much exceed \$8000. In making the estimate we have included in the city revenue city passengers carried on interurban cars. As a matter of fact, the interurban cars carry a considerable portion of the city passengers.

	1917	1918	1919	Estimate new tariff
	<i>Dollars</i>	<i>Dollars</i>	<i>Dollars</i>	<i>Dollars</i>
Railway operating revenues	107,241	108,673	115,350	123,642
Railway operating expenses	69,393	79,966	90,325	97,025
Net revenue railway operations	37,848	28,707	25,025	26,617
Taxes	6,288	7,250	8,212	8,300
Operating income	31,560	18,457	16,813	18,317
Non-operating income	114	110	451	450
Gross income	31,674	18,567	17,264	18,767
Total deductions from income	*39,547	29,002	29,008	29,000
Deficit	7,873	10,434	11,744	10.2 3

*Includes \$10,286 which should have been classified as operating expense and afterward was so charged on company's books. Deficit not affected by error.

For reasons stated in former Opinions, it is quite clear that the company is entitled at least to earn its fixed charges. Unless this estimate turns out to be woefully inaccurate, it will fail so to do by more than \$10,000. In other words, the entire increase is absorbed in necessarily increased expenses. The investment based upon a valuation made when the corporation was reorganized, and adjusted to December 31, 1919, amounts to \$639,168. The amount estimated to be available for interest and dividends, \$18,767, indicates a return of 2.94 per cent on this investment.

It is clear, therefore, that the company is entitled to an increase fully as great as that asked. It makes the rates high, so high in fact as to point toward the conclusion that unless experience proves more favorable to the company than the Commission's estimate some means other than further

increases must be found to maintain the system as a going concern.

On the interurban line there is a great disparity in mileage rates owing to the difference in the length of the zones. These zones were adjusted with regard to the location of the various communities and the needs of the patrons of the road. To adjust them by distance so as to equalize the rates would accomplish no good result. While the rate per mile might be equalized, the actual fares paid would be rendered much more irregular than they now are. The cash rate for the longest zone will be 2.68 cents a mile, the highest rate will be 4.70 cents, and the average 3.52 cents. The lowest ticket rate will be 2.36 cents, the highest 4.12 cents, and the average 3.08 cents. The highest rate is on the zone from Seneca Falls to Cayuga Lake Park. This is the zone of least travel and highest comparative operating expense. With the abandonment of the original project of extending the road to Auburn, and the later abandonment of Cayuga Lake Park as a resort, the reason for its original construction entirely ceased. The only reason for its continuance is a small population along and near the lake shore which has been long accustomed to the service and which should continue to have it, but which may reasonably be required to pay a higher rate for that purpose.

The Commission is not prepared to make any concrete suggestions as to methods aside from the present increase in rates for increasing revenues, nor is it prepared to make such suggestions as to decrease in operating expenses. The recent installation of two one-man cars within the city of Geneva should have some effect. The city of Geneva presents a serious problem. In 1916 the number of city passengers carried was 513,998; in 1919 it was 353,318. How small this is can be seen from a comparison with the number of passengers carried by certain other companies in 1919. Some of these have small interurban lines but in the main they are comparable.

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Vol. 2, 1920

Passengers Carried in 1919:

Batavia Traction Company.....	397,953
Cortland County Traction Company.....	2,028,817
Fishkill Electric Company.....	1,198,278
Hornell Traction Company.....	1,233,217
Ithaca Traction Corporation.....	2,427,158
Kingston Consolidated	3,858,612
Ogdensburg Street Railroad Company.....	872,838
Orange County Traction Company.....	3,862,966
Peekskill Street Railroad Company.....	1,257,893
Plattsburgh Traction Company.....	749,118
Wallkill Transit Company.....	1,556,352

Whether the failure of the people of Geneva to use the cars is due to topography, to improper planning of the system, to high average prosperity leading to abnormal use of automobiles, to inadequate service, or to other causes, we can not say. When we find the revenue per car-mile only 23.4 cents under a 5 cent fare in 1916, the year of high travel, and 25.9 cents under a 6 cent fare in 1919, we can not confidently assume that an increase of service on the existing lines would produce additional revenue sufficient to offset the increased expenses.

The problem should receive the active and intense study of the company officials. It must not be inferred, however, that the interurban line is carrying the city. Bad as the showing is in the city, it is estimated that of the probable operating income under the new fares the greater part should be realized from city operations.

All concur.

No. 538 : 539

In the Matter of the Investigation by the Public Service Commission, Second District, of the methods employed in supplying natural gas. [Case No. 7672.]

In the Matter of the Complaint of ROSS GRAVES of Buffalo *against* IROQUOIS NATURAL GAS COMPANY, alleging insufficient supply of natural gas, and that the illuminating and heating power is not sufficient. [Case No. 5901.]

In the Matter of the Complaint filed January 27, 1920, of FRANK C. PERKINS, as Commissioner of Public Affairs of the City of Buffalo *against* IROQUOIS NATURAL GAS COMPANY, alleging insufficient pressure and supply. [Case No. 5901.]

1. *Pressure. When unsafe and unreasonable.*

When a utility maintains a system of mains and pipes for the distribution of natural gas which was originally installed and is still maintained for a pressure of from four to five ounces, the distribution of such gas through such system at an actual pressure ranging as low as 2/10 of an ounce repeated on many days throughout the winter is unsafe, inadequate, unjust, and unreasonable.

2. *Cost to consumer unjustly enhanced by inadequate pressure.*

Gas which is supplied at the low pressures mentioned to an installation equipped for a four to five ounce pressure is burned at great loss to the consumer, who thus pays for the fault of the supplying company.

3. *Alteration of pressure standard.*

Where a natural gas distributing system together with the connected service pipes and house connections have been installed and designed for a four-ounce pressure, the Commission is of opinion that it is unsafe to attempt to lower the standard of pressure to two ounces except after a preliminary survey of the entire system, including service pipes and house connections and piping and such alterations therein as may be found necessary to accommodate the lower pressure.

4. *Mixed gas.*

Where it appears that a public utility company which sells and distributes natural gas in the state of New York experiences a shortage in its supply at peak-load periods, so that its service has become dangerous and inadequate, the remedy of requiring

the company to augment its supply by erecting a plant for the manufacture of coal or water gas to be mixed with its own product, is not considered wise under existing economic conditions in the coal gas and water gas industries, and in view of the doubt whether capital could be raised for such a purpose at this time.

5. Where the supply of natural gas of a utility company is insufficient to meet the demands of domestic consumers, industrial uses in excess of 40,000 cubic feet per month to any consumer are ordered to be discontinued during the months of December, January, February, and March.
6. *Gas engines of large size, boosters, fans and blowers* directed to be discontinued.
7. *Consumption in furnaces originally constructed for other fuels.*
The period of prohibition of such use enlarged so as to extend from November 1st to April 15th.
8. *Three-way rate for natural gas.*

For the purpose of encouraging avoidance of waste and the discouragement of excessive use at peak-load periods, the Commission recommends a trial of the so called three-way rate for natural gas in which the price is a combination of customer, demand, and consumption charge, the quantity of gas which must be made available for each consumer at all times being absolutely fixed and a heavy penalty being imposed upon the utility for failure to meet the demand as from time to time such failure may occur.

9. *"Sliding scale upward" rate.*

To the same end the Commission favors the introduction of the sliding scale upward rate, which is built up of steps in such manner that the unit price increases as the consumption increases during any particular month. The Commission recommends that in the use of such a scale the initial step be made 10,000 cubic feet per month and the final step be made considerably greater than in the scales now in general use.

Decided September 2, 1920.

Hearings in Case No. 5901 since previous order: February 26; March 6, 13, 30; June 15 and 21, 1920:

Appearances:

Frank C. Perkins, Commissioner of Public Affairs, City of Buffalo.

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Frederic C. Rupp, Assistant Corporation Counsel, City of Buffalo.

Daniel J. Kenefick, of Kenefick, Cooke, Mitchell & Bass, Buffalo, attorneys for Iroquois Natural Gas Company.

B. C. Oliphant, President, Iroquois Natural Gas Company.

Henry W. Killeen, Buffalo, for John F. Burke and others.

Hearing in case No. 7672, at Albany, August 12, 1920:

Appearances:

Bert C. Oliphant, President, and *P. C. Franchot*, Buffalo, for Iroquois Natural Gas Company.

Frederic C. Rupp, Assistant Corporation Counsel, for the City of Buffalo.

C. B. Livermore, Silver Creek, for Village of Silver Creek.

H. B. Ward, LeRoy, for Village of LeRoy.

James P. Hallahan, Corning, for the City of Corning.

Cyrus E. Jones for the City of Jamestown.

Michael A. Danaher for the City of Elmira.

William S. Stearns for the Village of Fredonia and the Town of Pomfret.

Henry Neff, Salamanca, for himself and other millers.

Robert G. Griswold, 60 Wall street, New York city, representing Henry L. Doherty Company.

A. R. Tremaine, Lancaster, for The Depew and Lancaster Light, Power and Conduit Company.

Williams, Minard & Howell (by H. C. Minard), 514 Erie County Savings Bank Building, Buffalo, for the Republic Light, Heat and Power Company *et al.*

E. C. Harder, Wellsville, for Empire Gas and Fuel Company, Ltd.

J. W. Germond, Wellsville, for Empire Gas and Fuel Company, Ltd.

Henry Bradley, Wellsville, for Empire Gas and Fuel Company, Ltd.

J. B. Bradley, Hornell, for Hornell Gas Light Company and Canisteo Gas Company.

F. W. Herron, Olean, for Producers Gas Company.

W. M. Gurnsey, Corning, Superintendent of the Crystal City Gas Company.

HILL, Chairman:

These proceedings taken together bring under consideration the methods employed by the Iroquois Natural Gas Company in supplying and distributing natural gas in its territory in Western New York, including the city of Buffalo. The first entitled proceeding has a statewide effect, all of the other natural gas companies operating in the State being parties thereto, but for the purposes of the order now to be made only the Iroquois Natural Gas Company will be considered.

The last entitled complaint charges in substance that the pressure furnished by said company in the city of Buffalo is variable and much less than should be maintained; that a normal pressure of five ounces should be maintained at the meters of the consumers with a minimum of four ounces at all times. This complaint further charges that the company is supplying gas to industrial consumers when there is not a sufficiency for domestic consumers, in violation of the provisions of an order of the Commission made November 19, 1918.

For many years the Iroquois Natural Gas Company and its predecessors have supplied natural gas to the public in the western part of the State of New York, the largest community so served being the city of Buffalo with about 500,000 population, and the company supplying upward of 80,000 consumers in that city. The investigation has covered quite a wide field, and the resulting order by no means solves the problems presented, although it is hoped that it will improve the conditions complained of.

The Commission has in previous years had occasion to make similar investigations, so that the results are not surprising. It is general knowledge and is not disputed, that for a great many years the natural gas pressure of the Iroquois

company, especially in the city of Buffalo, failed in the winter months, especially during the colder intervals. In a mild winter the inconvenience would not be serious. In 1918 the Commission sought to relieve the situation by prohibiting the use of gas for heating purposes in furnaces not originally constructed for the use of natural gas, on the theory that such use was wasteful. The following winter was mild, the order was enforced, and the result was measurably acceptable service and comparatively little distress or inconvenience, although shortages of supply did occur. In the following winter of 1919-1920 the order was still enforced, but the weather during the entire winter was severe, this severity being in the nature of frequent periods throughout the season when for several days in succession the temperature ranged near zero, Fahrenheit. Examinations of pressure charts at various points on the lines showed that at the peak load periods of the day the pressures varied from $2/10$ of one ounce to upward of 7 ounces. The higher pressures during these periods were in the southeastern portions of the city which are nearest the entrance mains.

The distribution systems of the company were originally installed and have always been maintained with a view to the maintenance of a pressure at the consumer's burner of from four to five ounces. It seems this pressure has traditionally been accepted as the standard for natural gas installations. Accordingly all of the service pipes and connections, as well as house piping and also all burners and appliances, have been installed with reference to this standard.

With a system of distributing mains, service connections, house piping and appliances thus installed for a pressure of from four to five ounces, and with an actual pressure ranging as low as $2/10$ of one ounce, repeated on many days throughout the winter, but one result could ensue. It is not an exaggeration to say that the service frequently broke down and became dangerous and intolerable. It is also

obvious that gas which is supplied at the low pressures mentioned to an installation equipped for a four-ounce pressure, will be burned at a great loss to the consumer, who thus pays for the fault of the supplying company. Accordingly there was just criticism and complaint on the part of consumers, not only that the volume of gas supplied was inadequate for the desired purposes but that the bills were excessive when compared with the results obtained.

Another effect was observable, the occurrence of which is fully explained by the testimony, namely, that as the season advanced the shortage of gas became more noticeable, due to the lessened reserve; and when in March the prohibition of consumption of gas for heating purposes in converted coal furnaces expired, the shortage of supply was more pronounced than at any previous time, extending up to the warm weather period in May.

During the investigation various hearings were held, at which the company was represented. The substantial facts as above stated were not, however, brought in issue, and the Commission is of the opinion that the conditions above described which existed in Buffalo during the past winter and spring resulted in a service which was unsafe, inadequate, unjust, and unreasonable. A repetition of the conditions described should by all means be prevented, even if strenuous measures are found necessary for such prevention.

Of course the great difficulty arises from the shortage in the supply of natural gas in the face of an increasing demand. The fact is that in the face of a general assumption that the supply of natural gas generally throughout the country has reached its apex and is due to gradually decline, the delivery in Buffalo by the Iroquois company has shown a general increase. The demand, however, has increased in still greater proportion. An idea of the volume supplied is furnished by the statement that the average total per day delivered to the mains in Buffalo in January, 1920, was 42,000,000 cubic feet. There was put into the Buffalo lines

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in 1919 somewhat more than ten billions cubic feet. Official figures indicate that New York state produced in 1917 upward of eight billions cubic feet, and consumed about twenty-two and one-half billions. This includes the entire State. Of the Buffalo supply, about 40 per cent came from wells in New York, the remaining 60 per cent coming from Pennsylvania.

THE FUTURE OF NATURAL GAS

There exists a very strong body of opinion to the effect that in general the production of natural gas in the United States has reached its limit, and is due gradually to decline and eventually cease over a period of from fifteen to thirty years. This general consideration is of less importance in any treatment of the Iroquois territory, however, than the future of the supply in the comparatively restricted area available to that city, for the reason that this commodity, unlike many others, can be conveyed only through pipes, and as concerns commercial purposes for a distance not exceeding approximately three hundred and fifty miles.

Without entering upon an exhaustive treatment of the subject, it is perhaps sufficient for the purposes of this discussion to make a few observations which it is believed are not subject to dispute. There is no appreciable regeneration of natural gas. When a supply is found and exhausted it does not renew itself. The average life of a gas well has been found to be less than eight years, showing that in general the exhaustion is rapid. The location of the deposits and measurement of the possibilities thereof even after they are developed is not an exact science, and the life of operating wells is largely matter of conjecture. The demand is constantly increasing. It follows that the future supply in any field is a matter of uncertainty, with the constant factor, however, that in territory where large consumption is taking place ultimate exhaustion is sure to come, and is only a matter of estimate in point of time.

With respect to the supply for Buffalo and the Iroquois

territory generally, in 1917 about 76 per cent thereof was purchased by that company from the United Natural Gas Company which produces in Pennsylvania. In the following year this proportion fell to 73 per cent, while in the past winter it fell to the neighborhood of 60 per cent. The remainder came from the Iroquois territory in the State of New York or was purchased by it in that State. A large part of the recent New York product came from new wells near Buffalo, in Bennington township, Wyoming county. Both the yield and the rock pressure in this development show indications of sharp decline, and all the evidence available indicates that both the New York and Pennsylvania fields are steadily declining both in quantity production and in rock pressure. The president of the company testified that in his judgment the production for the coming winter will be no greater than that of last winter, and that the amount which will be available from summer storage will be considerably less. Naturally this witness testified that while the company has some undrilled territory in New York it is becoming increasingly hard to get a location that looks available. It is stated that the drilling operations will be more than last year, and will be principally in the towns of Collins and North Collins in Erie county, and Bennington in Wyoming county; it was shown that during two years ended July 31, 1920, a total of 51 wells was drilled, of which 23 were producing wells and 28 were dry. It also appears that while Pennsylvania exports to New York and other States about 11 per cent of its product, it imports from West Virginia and elsewhere about 43 per cent of its own consumption. Recently great possibilities have been claimed for what is known as the new McKeesport gas pool in Pennsylvania, but investigation, including an examination of the report of the Pennsylvania State Geologist, would indicate that these developments are of a local nature and that the pressure and average flow have rapidly declined and may now be said to be inconsiderable.

It appears that the Iroquois company is likely to secure 10 per cent less gas by way of purchase from Pennsylvania than it did last year.

Of course the uncertainties surrounding the supply may resolve themselves in the direction of an unexpected improvement, and it is unsafe to prophesy with positiveness. It would seem, however, on the facts available that the Iroquois company has clearly arrived at the point where its service has become dangerous and inadequate, and where definite steps must be taken either to increase the supply to the necessary point or to so restrict and improve the uses and methods of sale, distribution, and utilization as to render the service which is continued to be given safe and reasonably adequate.

The complainant urges and insists that all that is necessary to bring about the desired result is that the Commission make and enforce an order requiring the company to provide a constant pressure of four ounces at the consumers' meters. Obviously the successful enforcement of such an order would solve the problem, and if such a solution is possible none other need be considered. The company claims, however, that there is a shortage in its supply of gas, that it is unable to meet the demands of its customers at peak-load periods, and that it is impossible to maintain a four-ounce pressure or any adequate pressure at such times. If it is impossible to provide the desired pressure, then no order requiring it would produce the needed result, and even if heavy penalties could and were to be collected they would not produce gas. Leaving on one side the question of the enforceability of such penalties, we should give first consideration to the practicability of so improving the distribution and utilization of the available gas as to overcome the principal shortcomings in the service and insure the use of the available gas in safety and to the best advantage.

INCREASED SUPPLY, MIXED GAS

By a recent amendment to the Public Service Commissions Law the Commission was given power, after investigation and hearing, to require a natural gas distributing company

to augment its supply whenever the Commission deems necessary and whenever artificial gas can be reasonably obtained, by acquiring by purchase, manufacture, or otherwise a supply thereof to be mixed with natural gas in order to render adequate service . . . or to maintain a proper uniform pressure. Various suggestions for additions to the supply have been seriously discussed and considered, although it must be borne in mind at the outset that any increase in volume brought about by the mixture of natural gas with manufactured gas entails serious drawbacks. Even under ordinary conditions the cost of manufactured gas, either coal gas or water gas, is very much in excess of the cost of producing and delivering natural gas, while at the same time the heating or calorific value of the manufactured gas is only about half that in a corresponding quantity of natural gas. Therefore the result of such a mixture would be a greatly enhanced price for a fuel containing much less potential value. Under ordinary conditions, such as obtained a few years ago, the cost of manufactured gas was from three to four fold the price of natural gas. Within the last few months, however, the costs of manufacture of both coal gas and water gas have very largely increased, and even at the increased costs such companies are finding great difficulty in securing proper supplies of gas coal and gas oil. These developments are a serious menace, at least for the time being, to the development of gas manufacturing establishments. It is quite doubtful whether capital could be raised for such a purpose at this time. The circumstances are such that the construction of auxiliary plants for the purpose of manufacturing gas for an auxiliary supply, at least at the present period, presents so many objections that such a measure is of dubious value.

COMBINATION WITH THE PLANT OF W. J. JUDGE

The Iroquois company is controlled by substantially the same interests which control the manufactured gas plant in

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Buffalo known as the W. J. Judge property, formerly the Buffalo Gas Company. This plant manufactures both coal gas and water gas and distributes the same for lighting purposes in that city, the output being about 760,000,000 cubic feet per year, or about two millions per day, and it has been proposed to improve the natural gas supply by merging these two properties, mixing the two gases and having one mixed gas in place of the respective outputs of natural and manufactured gas now delivered by the two plants. The product of the Judge plant is now all absorbed by its consumers, so that no additional volume to any consumer would result from the merger; and so far as the natural gas consumer is concerned, he would apparently be receiving a gas containing fewer heat units at an enhanced price. The present price charged by the Judge plant is \$1.45 per M, against 37 cents per M for natural gas from the Iroquois plant. It follows that no added supply can be expected from such a merger.

COKE-OVEN GAS

It has frequently been suggested that the natural gas supply be augmented by the purchase of coke-oven gas from producers of coke in Buffalo.

It is said to be possible that at an early date a limited supply of that character may be available, but there is no known available supply at the present time, so that for practical purposes help from that direction can not be relied upon. The Iroquois company is strongly urged to purchase coke-oven gas as opportunity may offer.

PURCHASE OF ADDITIONAL NATURAL GAS

The evidence shows that there is increasing demand for natural gas in Pennsylvania and wherever else it is produced; and in Pennsylvania and West Virginia, which are the two largest producing States, the question of restricting and conserving the consumption of the natural gas product is receiving most careful consideration at the hands of the public authorities. It is evident that these authorities are

taking steps to prevent wasteful use and also to prohibit the use of natural gas where other fuels can be made reasonably available.

It is quite certain that these states will find methods of preventing exportation of native gas to other states, at least unless the states receiving a supply cease to make use of it in wasteful devices or practices.

It has been intimated by counsel for consumers that the shortage of gas arises from the inability of the Iroquois company to pay the price demanded by producers in Pennsylvania. The company does not admit this. It is clearly its duty to purchase gas wherever it is available at prices which, all things considered, are not unreasonable. The price chargeable by it must, upon complaint, from time to time, be fixed by this Commission so as to provide a reasonable return.

IS MIXED GAS ESSENTIAL?

For the coming winter, at least, it would seem to admit of little question as to the Iroquois company that the best solution both for the company and its consumers is to eliminate the suggestion of a mixed gas and confine the use of natural gas as nearly as possible to domestic purposes and to the most efficient appliances, thus preserving the high potential value and relative low cost of the product. The recent legislation above referred to gave the Commission power, among other things, to prohibit the use of natural gas in wasteful devices and practices, and also to order the curtailment or discontinuance of its use for manufacturing or industrial purposes for periods aggregating not to exceed four months in any calendar year, if it be established to the satisfaction of the Commission that the supply of natural gas is not adequate to meet the reasonable demands of domestic consumption. The facts of the shortage of the supply during recent years in the Buffalo district of the Iroquois company are true of the remainder of its district in the state of New York in varying degree.

INDUSTRIAL USES

Quite a large quantity of the company's product is consumed through this territory for industrial purposes. The Commission feels that the bulk of this volume should be taken from the industrial use and restricted to domestic use. At the same time there are many of the smaller uses for industrial purposes which partake largely of domestic use and should not be disturbed. The Commission therefore proposes that industrial users in quantities not exceeding 40,000 cubic feet per month shall be exempted from the effect of the order in this respect. The evidence shows that the volume used by these smaller consumers does not exceed one million cubic feet per month. The total saving by means of this prohibition is estimated at thirty million cubic feet per month, or approximately one million cubic feet per day.

USE IN CONVERTED COAL FURNACES

The Commission also proposes to extend the period of prohibition of the use of gas for heating purposes in furnaces not constructed for such use over a longer period than formerly. There is no doubt that the prohibition of waste by this method of use during the past two years was very vital in conserving the supply.

GAS ENGINES, BOOSTERS, FANS, AND BLOWERS

The evidence shows that all of these devices, especially the larger gas engines, have the effect of creating an unreasonable variation in pressure in favor of the user of the device and that their use is therefore unfair and properly to be condemned. It is believed, however, that small gas engines not exceeding ten rated horsepower may be fairly excepted from the prohibitory clause of the order.

PRESSURE STANDARD

The expert witness Wyer advanced the opinion that by reducing the required pressure at the meter to about two ounces and doubling the price of gas to the consumer, the advanced price would prove so strong an inducement in favor of economical use that the resulting saving in the

required volume would solve the entire problem and that no auxiliary supply of manufactured gas would be found necessary. This witness, who is consulting engineer of the United State Bureau of Mines, strongly urged that no mixed gas is or for several years will be necessary if industrial uses are discontinued and the use of the gas is confined to domestic purposes other than heating, and only in efficient devices and at two-ounce pressure.

While this Commission can not subscribe to the novel method of rate making thus advocated, it is impressed with the urgency advanced by the witness for greater restriction in the uses of natural gas and also greater care to avoid wasteful practices. So far as price is concerned, it is assumed that the gas company may be safely left to advance its own proper claims as they may exist from time to time, and as they may alter by reason of changing conditions. The order to be made in this proceeding, therefore, has no direct bearing upon and does not directly affect the matter of price. That will be fixed from time to time as required by law, upon the basis of a reasonable return to the company.

With respect to the economies to be expected from the adoption of a lower pressure, it is doubtless true that in consumption of gas at the higher pressures there is increased probability of waste due to the larger volume being utilized, and undoubtedly a lower pressure will materially reduce the normal loss which takes place in the distributing mains by reason of leakage. It is not apparent, however, that appliances designed and installed for the higher pressure and supplied and intelligently operated at that pressure will consume materially more gas to produce a given result than appliances designed for and operated at the lower pressure. Neither is it perceivable, that reduction to a two-ounce standard will have the profound effect on consumption which is claimed by Mr. Wyer.

We are required to consider also that the alteration of a natural gas distributing system installed and designed for

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a four-ounce pressure, with a view to using it at half that pressure, involves engineering problems of no small importance and expense. All the witnesses agree that it would be unsafe to attempt such a change without a preliminary survey of the entire system, including the service pipes and house connections and piping, and such alterations therein as might be found necessary to accommodate the lower pressure. Pipes which serve acceptably for the higher pressure would in many instances prove inadequate for the lower pressure, and in many cases only actual trial would determine whether or not alteration was necessary. In addition to these problems remains the much simpler one of altering the appliances of the consumer but which would also involve a very substantial expense. Upon the present record the Commission can not therefore recommend the lowering of the pressure standard.

If the company will make and submit the necessary survey of its lines, connections, and consumers' appliances, with an estimate of the cost of the alterations and the time which would be involved in making them, the Commission will give further attention to the suggestion that the four-ounce standard of pressure be reduced.

METHODS OF BASING RATES

The Commission believes, however, that the Iroquois company's method of establishing the price of natural gas can be greatly improved upon in the direction of fairness to consumers of different classes, and also with the effect of bringing about greater care and economy and avoidance of waste in consumption.

There are other methods in use which merit careful attention of the Iroquois company.

THREE-WAY RATE

The Commission has been much impressed with the merit of what is known as the three-way rate, which has recently been put into effect in the State of Kansas. This rate so

combines the elements of customer charge, demand charge, and consumption charge, with a heavy penalty against the company for failure at any time to meet the stipulated quantity covered by the demand charge, that its adoption seems to be a very great advance on any other method so far proposed.

Briefly stated, this plan of charging for gas service consists in dividing the charge into three parts, called the customer, the demand, and the consumption charge. The customer charge is paid annually and includes such of the general expenses as relate to all consumers alike, such as the expense of providing capital, equipment, office, legal services, taxes, interest on securities, etc. The demand charge relates to the proportion of the total equipment of which the consumer demands the use, which may be estimated at a certain sum per thousand heating units or cubic feet of the demand. The consumption charge is placed at a flat rate per thousand B.t.u.'s or cubic feet covering the actual quantity used. This is really an adaptation of widely used electric rates to the distribution of gas.

An important feature of this rate is that the quantity of gas which must be made available for each consumer at all times being absolutely fixed, a measure is thus afforded for a heavy penalty which is imposed upon the company for failure to meet the agreed demand as from time to time such failure may occur, and equally important is the inability of the consumer to exceed the stipulated demand at peak periods.

The advisability of putting the three-way rate into immediate effect in the Iroquois territory has been discussed with the company and is under serious consideration. The expense of such an installation is considerable, for the reason that an auxiliary measuring device is required for each customer, involving quite a large expense, and the company feels disinclined to make the necessary expenditure without some preliminary experimentation.

For this reason the general installation of this rate throughout the territory of the company is not urged at this time, but the Commission does strongly recommend that a trial be made in one or more of the smaller communities supplied by the Iroquois company at as early a date as practicable, with a view to ultimate extension if it is found to be meritorious.

"SLIDING SCALE UPWARD" RATE

Another basis for natural gas rates, which has for its object the discouragement of excessive use at peak-load periods, is the "sliding scale upward" rate. As its designation implies, this rate is built up of steps in such manner that the unit price increases as the consumption increases during any particular month. This rate has been installed in a number of Ohio cities, and also in the city of Jamestown, N. Y., and reports indicate that in considerable measure it accomplishes the desired end. It should be understood that the use of such a rate does not necessarily imply an increased revenue to the company, its supposed main design being to penalize excessive use in peak-load periods. A common formula for this rate is the following:

First 5 M cubic feet at.....	x¢
Second 5 M cubic feet at.....	x¢ + 10¢
Third 5 M cubic feet at.....	x¢ + 15¢
All over 15 M cubic feet at.....	x¢ + 20¢

Under such and similar formulae, savings as high as 32 per cent of the former supply are reported. Experience has developed a tendency, however, to increase the degree of the later steps. The Commission is of the opinion that in the use of such a scale its legitimate purpose will be much better served if the initial step is doubled and the final step made considerably greater. The effect will naturally be to improve the service to the moderate consumer and penalize waste and excessive consumption. In view of the claim which is broadly made by the witness Wyer and others, that no mixed gas is necessary provided waste and excessive use

are avoided, the Commission is inclined to believe that in the present exigency the introduction of such a rate is desirable and affords the most hopeful method of relief which is available. Of course, with such a method it would be clearly unjust to penalize the consumer unless the gas for the use of which he is charged is supplied to him at a suitable pressure.

STOPPAGE OF WASTEFUL METHODS

Much emphasis is placed by all the witnesses on the importance of intelligent use of gas by the consumer in order that the full or approximate potential value of the gas be utilized and that waste and extravagance be avoided. The claim is advanced that the greater part of the available heating value goes to waste and only the lesser part utilized. Much of this carelessness comes from the abundant and cheap supply of former years when thrift and care in utilization were not considered important, while some of it is due to improper fixtures and adjustments. The importance of educating the consumer along the lines of care and thrift and intelligent manipulation can not be overestimated, and the company is urged to make careful inspections of the appliances used by its consumers and to supply them with instructions from time to time along the lines indicated. It is believed that constant activity on the part of the company in this regard will result in greatly improved conditions.

TO SUMMARIZE:

1. It is not deemed advisable under existing conditions to provide for a mixed gas.
2. It is recommended that the Iroquois Natural Gas Company consider the introduction of the "sliding scale upward" rate, and ultimately the three-part rate.
3. The prohibitory period for the consumption of gas in furnaces originally constructed for the use of other fuels is extended so as to begin November 1st and continue to April 15th.

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4. Industrial use in excess of 40,000 cubic feet per month shall be discontinued between December 1st and April 1st.

5. Gas engines exceeding ten horsepower, and boosters, fans, and blowers shall be discontinued.

6. The company is directed to make a survey of consumers' appliances, and supply to its patrons instructions for the efficient and economical use of such gas.

7. Four ounces is continued as the standard pressure.

An order will be entered accordingly.

All concur.

In the Matter of the Complaint of BATAVIA CHAMBER OF COMMERCE, INC., for THE MASSEY-HARRIS HARVESTER COMPANY, INC., and THE HICKOX-RUMSEY COMPANY, INC., of Batavia, shippers, *against* LEHIGH VALLEY RAILROAD COMPANY (operating Lehigh Valley Railway) and THE NEW YORK CENTRAL RAILROAD COMPANY, asking that switch and sidetrack connection be established in the city of Batavia between the railroads operated by said companies. [Case No. 7593.]

1. By the Transportation Act, 1920, the authority of the Interstate Commerce Commission does not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, and the State has jurisdiction over such tracks.

2. Under its police powers the State may legislate in favor of the health, morals, safety, and convenience of its inhabitants. Such laws have their source in the powers which the States reserved and never surrendered to Congress and are not within the meaning of the Constitution; and considered in their own nature are not regulations of interstate commerce simply because for a limited time or to a limited extent they cover the field occupied by those engaged in such commerce, and they are to be regarded as valid until superseded by some act of Congress passed in pursuance of the power granted to it by the Constitution.

Decided September 2, 1920.

Appearances:

N. K. Cone, Esq., attorney, and *Hon. E. A. Washburn*, counsel, for the complainants.

Maurice C. Spratt, Esq., attorney for The New York Central Railroad Company.

W. L. Donaldson, Esq., Assistant General Freight Agent, for Lehigh Valley Railroad Company.

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BARHITE, *Commissioner*:

The business interests of the city of Batavia make application to this Commission for an order to compel the construction of an interchange track between the lines of the Lehigh Valley Railroad Company and the Batavia and Tonawanda branch of the New York Central railroad, in the city named. The main line of the Lehigh Valley railroad passes along the southerly boundary of the city, and less than half a mile north of it is the main track of the branch of the Central railroad to which reference has been made. A switch half a mile long, in the form of a curve, extends from the tracks of the Lehigh Valley railroad to within about one hundred feet of the tracks of the New York Central railroad.

This switch was built between the two railroads about the year 1891, and was intended to allow the Lehigh Valley trains to reach Niagara Falls and Suspension Bridge over the tracks of the New York Central railroad. In November, 1896, the Lehigh Valley Railroad Company, having completed tracks of its own, ceased to use the switch in question, and reached the places named by way of a junction at or near the city of Buffalo. Thereafter the connecting track between the two railroads at Batavia was severed and the switching apparatus at the point where it met the tracks of the New York Central railroad was removed, and about one hundred feet of the switching track was taken up at this point.

For a period of nearly twenty-four years there has been no track connection between the two railroads over the switch named. The switch, except that portion which was removed, is apparently in good condition, and is used by the Lehigh Valley railroad to draw cars to and from that road to a manufacturing plant situated along the Canandaigua and Tonawanda branch of the New York Central railroad. There is a connection between the switch in question and the tracks of The New York Central Railroad Company by means of a private switch owned by the industrial company named, and on the land of that company, and intended solely for the use

of that company. Through the courtesy of the officials of this company, cars at times are passed between the two railroads over the switch to which reference has been made and thence over the private switch.

The Chamber of Commerce of the city of Batavia in 1919 made application to this Commission, in case No. 6729, for an order directing a connection between the two railroads, but in that case the Commission held that under the statute as it then existed, and the interpretation of that statute by the courts of this State, the Commission had no authority to order a connection between the two railroads. At the last session of the Legislature the statute was amended, and the question now arises, in the first instance, whether that amendment is effective to give this Commission authority to pass upon the merits of the application; and whether, under the Transportation Act, so called, passed by Congress in the Spring of this year, this Commission or the Interstate Commerce Commission is the proper authority to pass upon the question under consideration. Section 35 of the Public Service Commissions Law of this State at the time the former case was heard provided that "Every common carrier is required to afford all reasonable, proper and equal facilities for the interchange of passenger and property traffic between the lines owned, operated, controlled or leased by it, and the lines of every other common carrier, and for the prompt transfer of passengers and for the prompt receipt and forwarding of property to and from its said lines; . . . this section shall not be construed to require a common carrier to permit or allow any other common carrier to use its tracks or terminal facilities. Every common carrier, as such, is required to receive from every other common carrier, at a connecting point, freight cars of proper standard, and haul the same through to destination, if the destination be upon a line owned, operated or controlled by such common carrier."

The courts of this State, in *People ex rel. New York*

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Central Railroad Company and International Railway Company, Relators, v. Public Service Commission, 177 A. D. 208, affd. 223 N. Y. 582, held as construed by this Commission, that the law did not permit the joining of the railroads under the conditions disclosed by the evidence presented in the case named.

The Legislature, however, has amended this statute by adding to that portion quoted these words, "and such service shall not be construed as requiring a common carrier to permit or allow any other common carrier to use his tracks or terminal facilities". In other words, under the statute as it now stands, if a carrier at a connecting point receives from another carrier freight cars of proper standard and hauls them to their destination upon its own lines, such service shall not be considered as a use of the tracks or terminal facilities of the road receiving the cars and thus come within the prohibition previously named in the statute.

The amendment made by the Legislature is a remedial statute and as such should be liberally construed. It was intended to avoid a mischief which is clearly apparent in the facts now before the Commission. (*Berger v. Varrelmann*, 127 N. Y. 281, at pp. 286 and 287; *Bechtel v. U. S.*, 101 U. S. 597.)

The contention of the Lehigh Valley Railroad Company in its answer, that this Commission is without jurisdiction to order the relief demanded by the complainants, and the more specific claim of The New York Central Railroad Company in its answer, that by the United States statute known as "The Transportation Act, 1920," the Interstate Commerce Commission has sole jurisdiction to consider and determine the question presented, are not well taken. The failure of the railroads in question to interchange freight is a violation of section 35 of the Public Service Commissions Law as now amended, and this Commission has power under section 48 of the same law to grant the appropriate relief.

Nor can it be correctly claimed that the Interstate Com-

merce Commission is the proper authority to grant relief from the evil against which complaint is made. Sections 18 to 21, both inclusive, of the Transportation Act, 1920, give to the Interstate Commerce Commission control over the extension of a line of railroad, the construction of a new line, and the operation of an extension or new line; but section 22 of the same act provides "the authority of the Commission conferred by paragraphs 18 to 21, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, etc."

In fact, the Interstate Commerce Commission can not, under the Constitution of the United States, be given any control over the situation under discussion, unless it shall appear that to grant the relief required by the complainants would directly or indirectly interfere with interstate commerce, and such a contention could be the result only of a subversive and elastic logic. It is true that the two railroads are partly engaged in interstate commerce, but the object of the connection between the two is solely for local purposes, to conserve the convenience and promote the business and save expense to the shippers of Batavia.

A carload of freight may come over the Lehigh Valley railroad from a point beyond the state line; it is billed to Batavia; when that city is reached the car is dropped from the train and the train proceeds on its journey. Batavia is the destination of the car; its subsequent movements are only for the purpose of placing it at a point convenient to the place of business of the consignee. When the railroad leaves this car at Batavia its charges are earned and its contract completed, and the shifting of that car to another point in the city is a separate movement for which another charge may be made.

The above views are in harmony with and are supported by numerous decisions of the Supreme Court of the United States.

In *Hennington v. Georgia*, 163 U. S. 299, the fact appeared that the State of Georgia passed a law forbidding the running of any freight train in any railroad in the State on Sunday, and provided a penalty for disobedience. The superintendent of a railroad was arrested for violation of the law. His defense was that the train which had run through Georgia on Sunday was engaged in interstate commerce, and was carrying freight from Chattanooga, Tennessee, through Georgia and Alabama, to Meridian, Mississippi, and that applied to those facts the statute was repugnant to the Constitution of the United States. The Supreme Court of the United States said "No"; and in upholding the case used these words: "We are of the opinion that such a law, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the domain of federal jurisdiction, nor strictly a regulation of interstate commerce, but considered in its own nature is an ordinary police regulation designed to secure the wellbeing and to promote the general welfare of the people within the State by which it was established, and therefore not invalid by force alone of the Constitution of the United States".

The court, in the progress of its opinion, cited many of its own decisions, and as a result lays down this doctrine:—

These authorities make it clear that the legislative enactments of the States, passed under their admitted police power, and having a real relation to the domestic peace, order, health and safety of their people, but which, by their necessary operation, affect to some extent, or for a limited time, the conduct of commerce among the States, are yet not invalid by force alone of the grant of power to Congress to regulate commerce; and if not obnoxious to some other constitutional provision or destructive of some right secured by the fundamental law, are to be respected in the Courts of the Union until they are superseded and displaced by some act of Congress passed in execution of the power granted to it by the Constitution. Local laws of the character mentioned have their source in the powers which the States reserved and never surrendered to Congress, of provisions for the public health, the public morals and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature

regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce.

In *Lake Shore and Michigan Southern Railway Company v. Ohio*, 173 U. S. 285, the Supreme Court discussed the effect and force of an Ohio statute which provided that any railroad company should cause three trains, each way, if so many were run daily, to stop at any city or village of over three thousand inhabitants. Counsel for the railroad contended that the police powers of the State, when exerted with reference to matters more or less connected with interstate commerce, are restricted in their exercise, so far as the National Constitution is concerned, to regulations pertaining to the health, morals, or safety of the public, and do not embrace regulations designed merely to promote the public convenience. The court says—

This is an erroneous view of the adjudications of this court . . . There are however numerous decisions by this court to the effect that the State may legislate simply with reference to the public convenience, subject of course to the condition that such legislation is not inconsistent with the National Constitution nor with any act of Congress passed in pursuance of that instrument, nor in derogation of any right granted or secured by it.

And again—

The power of the State by appropriate legislation to provide for the public convenience stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals, or the public safety.

In the cases cited, the state statutes under consideration clearly interfere with the orderly progress of interstate commerce, and yet the court held that as Congress had not taken the matters covered by the statutes under control the legislative will of the State under its police powers was supreme.

And neither should the statute which this Commission has now under consideration or similar statutes be so construed as to place matters of regulation and of railroad control in the hands of one central governmental body unless the canons

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of construction plainly require it. There are approximately two hundred and fifty thousand miles of steam railroad extending through forty-eight different States, and to give one central authority control over the hundreds of questions which are continually arising concerning the management and operation of the country's most important utilities is to practically deny regulation of those utilities for the benefit of the public. No matter how energetic and industrious that central body may be, it would be impossible for that body to give proper and prompt consideration to the many matters demanding its attention. Local questions are best controlled by local authorities who are near enough to examine and appreciate the situation and yet not near enough to be influenced by neighborhood considerations.

It is unnecessary at this time to consider the facts of this case. These facts were discussed in the former proceeding before this Commission. The situation has not changed. The legal difficulty which then prevented this Commission from granting relief has been removed, and the convenience of the business interests of the city of Batavia require that an interchange track between the two railroads should be completed.

All concur.

In the Matter of the Complaint of SAMUEL A. CARLSON
AS MAYOR OF THE CITY OF JAMESTOWN *against* JAMES-
TOWN TELEPHONE CORPORATION as to increase in rates in
said city proposed to be effective March 1, 1920. [Case
No. 7350.]

The Commission can not lawfully disapprove rates specified in a tariff duly filed by a telephone corporation on the ground that the company had previously agreed with the municipality affected not to apply to the Commission for leave to increase rates within a period which has not yet expired.

Decided September 9, 1920.

Appearances:

Ernest Cawcroft, Corporation Counsel, and *Frank H. Mott* for City of Jamestown.

Robert H. Jackson, Jamestown, for respondent.

HILL, Chairman:

This is a complaint on behalf of the City of Jamestown against the reasonableness and justness of certain telephone rates contained in a local general tariff applicable to Jamestown and contiguous territory included in the Jamestown free exchange area, which rates became effective March 1, 1920, and have since continued and are now in effect. The complaint falls under subdivision 1 of section 91, and subdivisions 1 and 2 of section 97, of the Public Service Commissions Law.

The exchange rates which form the substance of the complaint are subject to a discount of 10 per cent if paid quarterly in advance during the first fifteen days of the quarter, and the *net* rates per annum are as set out below, namely—

<i>Individual Line</i>		<i>Two-party Line</i>		<i>Four-party Line</i>
<i>Business rate</i>	<i>Residence rate</i>	<i>Business rate</i>	<i>Residence rate</i>	<i>Residence rate</i>
\$84	\$39	\$66	\$33	\$27

The Jamestown net rates only are taken because experience shows that discounts of this character are almost universally availed of by the customer.

Counsel for the city point out that the scale of charges so adopted exceeds that for corresponding service in other areas of comparable size. The rates with which comparison is made have since been superseded by higher rates which became effective September 1st. None of these rates have been the subject of determination as to their reasonableness, and as the superseded lower rates are under complaint as being unreasonably high, these rates may be likewise so considered. A comparison, therefore, is of little if any value and is only made because invoked by the complainant. Comparing the Jamestown exchange rates with those in the exchanges below named as now in effect, we get the results shown. The Jamestown *net* rate is used in the comparison, there being no prompt payment discount allowed in the other exchanges named.

	<i>Individual Line</i>		<i>Two-party Line</i>		<i>Four-party Line</i>
	<i>Bus. rate</i>	<i>Res. rate</i>	<i>Bus. rate</i>	<i>Res. rate</i>	<i>Res. rate</i>
Jamestown.....	\$84	\$39	\$66	\$33	\$27
Elmira.....	81	45	66	39	33
Glens Falls.....	81	45	66	39	33
Newburgh.....	81	45	66	39	33
Poughkeepsie.....	81	45	66	39	33
Watertown.....	81	45	66	39	33
Kingston.....	81	45	66	39	33
Hudson Falls.....	81	45	66	39	33
Lockport.....	72	42	60	36	30
Rome.....	72	42	60	36	30
Olean.....	72	42	60	36	30

It will be noticed that two classes of exchanges seem to have been mingled by complainant in this list, and that compared with either, the Jamestown rates are the lowest except the individual business rate which is \$3 per year higher than in the one class and \$12 per year higher than in the other class. It does not appear how the total revenues from the entire scale will compare. It does appear, however, that in the Jamestown exchange the revenue from residence lines is about 150 per cent greater than that from business lines, so that the indications are that such a com-

parison would not be unfavorable to the relative reasonableness of the Jamestown rates.

VALUE OF PROPERTY USED AND USEFUL IN THE PUBLIC SERVICE

In the year 1919 the present company took over the competing properties of the then existing Jamestown Telephone Corporation, a so called Bell company, and of The Home Telephone Company, in the city of Jamestown, and also the properties of the East Randolph Telephone Company and the Chautauqua Telephone and Telegraph Company, thus bringing about a practical consolidation of all the telephone properties in the district, the three latter being so called independent companies. The properties of the last two companies were only about \$40,000, and constituted a negligible proportion of the whole. In connection with the capitalization of such properties by the new company, this Commission made its own examination and appraisal, and the reports on file with the Commission show that the quantities of property were carefully checked and inventoried, and that the division of telegraphs and telephones based its estimates of value on the cost records of the companies, and that so far as possible such cost records were adopted with a deduction for actual depreciation. There was included an item of \$45,360.56 for intangible capital, which included both assumed expense of organization and going value. These allowances seem to have been moderate. In connection with such valuation, the companies claimed that the appraisal should be based on replacement costs. This claim was rejected by the Commission and an actual cost basis adopted instead. The total fixed capital thus arrived at as of April 30, 1919, was \$1,003,781, to which should be added working assets of about \$40,000. The City of Jamestown, through its local authorities, took an active interest in this capitalization proceeding and became a party to it. At the hearing herein, the Commission's examination and appraisal were placed in evidence by the

counsel for the city, and no evidence was produced by it to in any way challenge or reduce it.

It does not appear that any considerable deduction was made on account of duplication of parts, as would naturally be expected in such a merger or consolidation. This was for the reason that the company claimed that all of the property of the constituent companies would at an early date come into use in the public service and that therefore no such eliminations should be made. But there was some duplication which was inevitable, and the Jamestown switchboard of the Home company was abandoned and only the assumed junk value allowed. The connections were transferred to the switchboard of the Bell company, which then became the Jamestown city central station. Some idea of the extent of duplication may be had from the fact that before the merger the number of stations connected with the Bell company's Jamestown central office was 4327 as compared with 4152 in the competing Jamestown exchange of the Jamestown company, while after consolidation the total connections with which business continued was 7883, which number has since been reduced to 7434. It may be that the capital account is somewhat large by reason of the treatment which was thus given it in the capitalization proceeding. The question is not important, however, for the reason that the increased rates can be justified on a much smaller investment providing the operating results and conditions are as claimed by the company.

REVENUE AND OPERATING EXPENSE

As stated, the exact amount of investment upon which the company should be allowed to earn a return is not of vital importance in this case, in view of the financial results of the company's operations.

The income statement for ten months preceding March 1, 1920, the effective date of the increased rates which are under discussion, is as follows:

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JAMESTOWN TELEPHONE CORPORATION—EXHIBIT No. 1

Statement No. 1—Statement of Income from May 1, 1919, to February 29, 1920, inclusive:

300	Telephone operating revenues (see Statement No. 2)	\$185,247.70
301	Telephone operating expenses (see Statement No. 3)	182,979.73
	Net telephone operating revenues	\$2,267.97
302	Other operating revenues	
303	Other operating expenses	
	Net other operating revenues	
	Total net operating revenues	
304	Uncollectible operating revenues	\$1,071.15
305	Taxes assignable to operations	11,400.31
	Total deductions from operating revenues	\$12,471.46
	Total operating income	\$10,803.49
310	Rent revenues from lease of telephone plant	
311	Miscellaneous rent revenues	
312	Dividend revenues	\$233.35
313-01	Interest earned	7,525.69
313-02	Interest charged construction	
314	Sinking and other reserve fund accretions	47.50
315	Profits from operations of others	
316	Miscellaneous non-operating revenues	125.01
	Total non-operating revenues	\$7,931.55
320	Rent expense	
321	Miscellaneous non-operating expense	
322	Non-operating taxes	
323	Uncollectible non-operating revenues	
	Total non-operating revenue deductions	
	Net non-operating revenues	\$7,931.55
	Total gross income	\$2,871.94
330	Rent deductions for lease of telephone plant	
331	Rent deductions for telephone offices	\$331.71
332	Rent deductions for conduits, poles, and other supports	2,884.84
333	Rent deductions for instruments and equipment	3,074.79
334	Miscellaneous rent deductions	.67
	Total rent deductions	\$6,792.01
335	Interest deductions for funded debt	\$21,999.55
336	Other interest deductions	7,955.57
338	Amortisation of debt discount and expense	141.56
339	Less release of premiums on debt, Cr.	
	Total interest deductions	\$30,096.68
337	Loss on operations of others	
340	Amortization of landed capital	\$754.00
341	Miscellaneous deductions from income	4.04
	Total miscellaneous deductions	\$758.04
	Total deductions from gross income	\$37,646.73
	Balance, net income	\$39,918.67
350	Appropriation sinking and other reserve funds	
351	Dividend appropriation of income	
352	Appropriation construction, equipment, and betterments	
353	Miscellaneous appropriation of income	
	Balance for corporate surplus	\$39,918.67

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Statement No. 2—Statement of Telephone Operating Revenues from May 1, 1919, to February 29, 1920, inclusive:

<i>Exchange Service Revenues:</i>		
500	Subscribers' station revenues.....	\$144,879.08
501	Public pay station revenues.....	
503	Service stations.....	
504	Private exchange lines.....	
505	Minor rents of exchange plant.....	3,189.20
506	Other exchange revenues.....	
Total exchange service revenues.....		\$148,068.28
<i>Toll Service Revenues:</i>		
510	Message tolls.....	\$35,608.27
512	Leased toll lines.....	
513	Telegraph tolls.....	
514	Telegraph service on tolls.....	170.00
515	Minor rents of toll plant.....	
516	Other toll revenues.....	
Total toll service revenues.....		\$35,778.27
<i>Miscellaneous Operating Revenues:</i>		
520	Messenger service.....	
521	Telegraph commissions.....	
522	Other telegraph service charges.....	
523	Advertising and directory.....	\$1,401.16
524	Rents from other operating property.....	
525	Other miscellaneous revenues.....	
Total miscellaneous operating revenues.....		\$1,401.16
Total telephone operating revenues.....		\$185,247.70

Statement No. 3—Statement of Telephone Operating Expenses from May 1, 1919, to February 29, 1920, inclusive:

601	Supervision of maintenance.....	\$3,835.06
602	Repairs of aerial plant.....	14,544.71
603	Repairs of underground plant.....	1,402.40
604	Repairs of central office equipment.....	3,780.20
605	Repairs of station equipment.....	8,162.48
606	Repairs of buildings and grounds.....	1,327.53
607	Station rooms and changes.....	6,632.51
608	Depreciation of plant and equipment.....	39,228.77
609	Extraordinary depreciation.....	
610	Other maintenance expenses.....	
611	Repairs charged to reserve, Cr.....	\$,311.61
Total current maintenance.....		
Total maintenance.....		\$76,602.18
621	Traffic superintendence.....	\$578.01
622	Service inspection.....	
623	Operating clerical wages.....	1,776.53
624	Operators' wages.....	62,011.92
626	Rest and lunch rooms.....	83.42
627	Operators' schooling.....	1,275.99
628	Transmission power.....	2,259.04
629	Central office stationery and printing.....	374.81
630	Messenger service.....	136.35
631	Miscellaneous central office expenses.....	2,281.54
632	Pay station expenses.....	23.34
633	Other traffic expenses.....	458.15
635	Leased line operating expenses.....	
Total traffic.....		\$71,259.10
640	Commercial administration.....	\$1,290.79
642	Advertising.....	387.11
643	Canvassing.....	4,237.44
644	Sub-licencee relations.....	
646	Revenue accounting.....	4,639.85
647	Revenue collecting.....	8,584.57
648	Pay station commissions.....	225.59

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649	Directory expenses.....	\$2,924.94
650	Other commission expenses.....
	Total commercial.....	\$17,290.29
660	General office salaries.....	\$10,997.68
663	General office supplies and expenses.....	2,817.69
667	General law expenses.....	376.30
668	Insurance.....	807.75
669	Accidents and damages.....	53.49
670	Law expenses connected with damages.....	.....
672	Relief department and pensions.....	2,206.98
673	Telephone franchise requirements.....	2,262.90
674	Amortisation of franchise and patents.....	.....
678	Other general expenses.....	569.27
679	Less telephone franchise requirements, Cr.....	2,262.90
690	Less charged construction.....	.....
	Total general and miscellaneous.....	\$17,828.16
	Total telephone operating expenses.....	\$182,979.73

This shows a gross income deficit for the period of \$2271.94. Exhibit No. 2 shows operations for the month of March under the increased rates, with a total gross income of \$1450.81. Exhibit No. 3, balance sheet as of February 29, 1920, shows a deficit in surplus account of \$39,918.67, while the estimated revenue, expense, and income for a one-year period under the increased rates indicates a gross income of only \$27,492, as follows:

JAMESTOWN TELEPHONE CORPORATION—EXHIBIT No. 13

Statement Showing Estimated Revenues, Expenses, and Income for One Year, Allowing for Increased Rate, Increased Operators' Wages, and Increased Interest Charges on Account of Additions to Fixed Capital:

Telephone Operating Revenues:	
Exchange service revenues.....	\$233,344.00
Toll service revenues.....	42,934.00
Miscellaneous operating revenues.....	4,399.00
Total telephone operating revenues.....	\$280,677.00
Telephone Operating Expenses:	
Maintenance.....	\$46,197.00
Depreciation.....	49,362.00
Traffic.....	99,210.00
Commercial.....	20,125.00
General and miscellaneous.....	21,350.00
Total telephone operating expenses.....	\$236,244.00
Total net telephone operating revenues.....	\$44,433.00
Deductions from Operating Revenues:	
Uncollectible operating revenues.....	\$1,716.00
Taxes assignable to operations.....	16,000.00
Total deductions from operating revenues.....	\$17,716.00
Total operating income.....	\$26,717.00
Net non-operating revenues.....	775.00
Total gross income.....	\$27,492.00

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<i>Deductions from Gross Income:</i>	
Rent deductions	\$7,476.00
Interest deductions	30,018.00
Miscellaneous deductions	905.00
Total deductions from gross income	\$38,399.00
Balance, net income	\$10,907.00

All the above accounts and calculations include toll and long distance revenues.

None of the company's figures of revenue and operating expense have been challenged on the part of the city, nor does there seem to be ground for serious criticism of them. The charge for depreciation is about 5 per cent of the book value of the depreciable property, and is not out of line with percentages which have been approved by the Commission for telephone companies. Of course, if the investment value should prove to be largely over-estimated, this percentage would be greater, but with so large a gap between indicated gross income and a reasonable return upon the valuation allowed in the capitalization proceedings, it would seem that further demonstration of the need of the increased revenue which the new rate would produce is unnecessary.

AGREEMENT WITH CITY AS TO RATES

The principal ground of the city's case against the proposed rate increases, and to which it has directed the attention of the Commission, was based upon an agreement or understanding which it claims to have had with the telephone company governing the fixation of rates for a period of two years which expires in the Spring of 1921.

In the year 1918 the present telephone company, or those interested in it, undertook the acquisition of the properties of the two competing telephone companies in the city of Jamestown known as The Home Telephone Company and the New York Telephone Company. It was found that certain restrictions were in effect upon the rates which The Home Telephone Company could charge, such restrictions being found in the statutory consent which the City of Jamestown had given to that company to construct and

operate its plant. Negotiations were opened with the city council, with the result that the objectionable restrictions were repealed or annulled. This action was taken upon the representation by those interested in the new company, which representation was afterward accepted by the company itself, that the present company would not during the period of two years apply to the Public Service Commission for leave to increase rates in such city beyond a certain level.

It appears that both the city and the company fully understood at the time of this agreement or understanding that it did not have the effect of limiting or restraining the power of the Commission to increase the rates within the period stipulated (*South Glens Falls case*, 225 N. Y. 216; *Union Dry Goods Co. v. Georgia Public Service*, 248 U. S. 372); in fact, the corporation counsel so advised the common council of the city. In the present proceeding counsel for the city do not seriously claim, as I understand them, that the agreement, if it may be called such, is any bar to the power of the Commission to approve the increases. It is noticeable that the agreement was not in terms that the company should refrain from increasing rates, but that it would not apply to the Commission for leave to increase rates. No application to the Commission, however, was necessary. The company had the power to increase rates on thirty days' notice by filing schedules, pursuant to the provisions of section 92 of the Public Service Commissions Law. After such a filing the city could complain of the rates, whereupon the Public Service Commission would have power to determine what were the just and reasonable rates to be charged. Undoubtedly, however, the intention of the parties was that the rates should not be increased by any action of the company during the period stipulated either by the filing of schedules or by petition, and both parties have so treated the meaning of the agreement. As pointed out, the agreement or understanding in question does not create a limitation or restraint upon the power of the Commission. It is in effect an agreement by the company with

the local authorities not to take the necessary legal steps to increase its rates within a certain period. If such an agreement is binding upon the company (although not binding upon the power of the Commission), the way is open for the city to enforce it in the courts of the state by means of injunction or prohibition, and the sitting commissioner so intimated at the hearings.

Assuming, however, that the company is in need of the additional revenue for the purpose of paying operating expenses and meeting its interest obligations, it is difficult to discover any real benefit which would enure to the telephone rate-payers by depriving the company for a short period of a just measure of revenue. No good purpose can be accomplished by impoverishing a desirable public utility and injuring its financial integrity. In the end, such a course must necessarily prove injurious to all concerned. Counsel for the city, while apparently conceding the legal aspects of the situation to be as above outlined, contends that the so called agreement "creates an equitable bar to the present advance in rates, as to which the Public Service Commission, in the exercise of its functions, should protect the interests of the city of Jamestown and not require the city to resort to the courts to procure a judicial determination of the question involved". But the Commission is not a court of equity, and we think we have made it sufficiently plain that any recourse which the city has with respect to the enforcement of the agreement in question can be properly presented only to the court and is not justiciable by the Commission.

For the reasons stated, the complaint should be dismissed.

Commissioner Barhite concurs; Commissioners Irvine and Kellogg concur in result, with memorandums; Commissioner Van Namee not present.

KELLOGG, *Commissioner*, concurring in result:

I vote for the order suggested in the opinion herein but I do so with much regret, conscious that by the collection of

the disputed rates a solemn agreement between this Telephone Company and the City of Jamestown is being repudiated.

When this company was formed by consolidation, the common council of the city by resolution released it from an obligation of one of its constituent companies, to pay to the city a certain percentage of its gross receipts (sustained by the courts in *Jamestown v. Home Telephone Company*, 125 App. Div. 1). This resolution contained the following preamble:

Whereas, this council has received *the pledge of the good faith of the persons controlling said Home Telephone Company* and who are hereafter to control said new corporation that said new corporation will not for a period of at least two years ask any approval or consent of the Public Service Commission, aforesaid, to any increase in rates for the service furnished by it within said city.

Following this recital and based upon it, the council granted to this company various rights, including the privilege to use its streets, and also consented to the annulment of the franchise of its constituent company providing for the payment of a percentage of its gross receipts.

Although it was not necessary to apply to the Public Service Commission for consent to an increase of rates, and although such increase could be had by the filing of a tariff on thirty days' notice, it was manifestly the intent of the parties, and was so considered upon the hearing, that this was a gentleman's agreement, perhaps not enforceable in law but in fact a condition under which valuable rights were conveyed, which precluded this company from increasing its rates during the two year period which does not expire until some time in 1921.

"The pledge of the good faith" of the parties in interest, evidenced by a formal resolution of this company, is claimed now by it to be worthless.

If any power existed in this Commission to prevent the consummation of this moral fraud, I would vote against this order. But our authority in the matter is definitely limited by statute.

Our only power to act in a case like this is conferred by section 97 of the Public Service Commissions Law. And the sole question thereunder to be determined is as to whether the rates are "unjust, unreasonably or unjustly discriminatory or unduly preferential or in anywise in violation of law". For the reasons stated and the tables so carefully worked out in the Chairman's opinion, the challenged rates do not come within any of the criticisms of this section, and we would therefore not be justified in restoring them to the former level, or in anywise reducing them. Any attempt so to do, in view of the limitations of the law, would be a usurpation of power not conferred.

If there be a remedy in a court of equity to enforce the provisions of this contract, it is available to the city. But if this agreement has no obligation enforceable at law, then it is simply a case where a municipality's authorities have relied on the word and pledge of those whose word and pledge are valueless.

This corporation is evidently attempting to collect rates to which it is not morally entitled, but there is no power vested in this Commission to prevent the repudiation of its solemn agreement. I vote for the order with the express and clear understanding that I do so *only* because I can find in law no way for this Commission to enforce the carrying out of this agreement of the parties. Our only duty in the premises is to pass upon the justice, reasonableness, and fairness of the rates which are challenged.

The fact that rates have been fixed by filing a tariff in express violation of an agreement to the contrary with the municipal authorities does not bring the case within our jurisdiction under the limitations of the statute defining our powers and duties.

The manifest dishonesty of the officials of this company in directly violating this solemn agreement with the City of Jamestown is here referred to, not in any scolding or preaching spirit, but the transaction is disclosed thus fully on the record in order that in the future this Commission may not be led into a similar error in relying on any unenforceable promise made by the officials of this company. It may also happen that sometime in the future this company may be before this Commission in some proceeding within our discretionary powers. In that event, we may be able properly to take such action that ultimately this company can be prevented from profiting by its perfidy, at the expense of the citizens of Jamestown who granted to it valuable privileges, relying upon its "pledge of good faith" which it now so lightly sets aside.

LEVINE, *Commissioner*, concurring:

I concur with the Chairman, but, like Commissioner Kellogg, I can not refrain from expressing my reluctance. It is quite evident that the Jamestown city council realized that it could not usurp the rate regulating powers of this Commission, and that the Commission would, if the question were brought before it, be compelled to fix or sustain rates adequate to maintain a proper service now and in the future and yield a fair return on the investment. It therefore saw fit to exact a pledge of good faith from the persons controlling the corporation that they would not invoke the power of the Commission to increase the rates for a period of two years. In terms, this does not pledge the corporation not to file tariffs increasing rates within that period. It merely pledged it not to seek the aid of the Commission to increase rates. I nevertheless regard the procedure as a breach of good faith and an evasion of the pledge.

No. 541 : 579

Petition of FRED I. DAILEY under chapter 667, laws of 1915, for a certificate of public convenience and necessity for the operation of a stage route by auto buses in the city of Watertown, it appearing that the route is now operating in and between Watertown, Clayton, and Alexandria Bay. [Case No. 7722.]

Certificate for Auto Bus Line: Operation of auto bus line between Watertown, Gunns Corners, Depauville, Clayton, and Alexandria Bay, granted.

When three main traveled routes exist between two points, all practically the same distance and all occupied by different auto bus lines charging the same fare, the Commission can not attempt to confine through travel to any one particular route.

Decided September 28, 1920.

Appearances:

Francis M. McKinley, Clayton, attorney for petitioner.

Thomas Burns, Watertown, attorney for House & Vrooman.

VAN NAMEE, Commissioner:

Fred I. Dailey is a resident of the village of Clayton, Jefferson county, and under a permit from the City of Watertown and a certificate of convenience and necessity from this Commission has been operating an auto bus line between the city of Watertown and the village of Clayton. His original permit from the city having expired, on the 3rd day of May, 1920, the city council granted him a permit for a period of five years from April 1, 1920, for the operation over certain streets in the city of Watertown of an auto bus line, the route in the city of Watertown being specified in his petition from Public Square, through Court street, Main street, and Bradley street to the city limits, and thence along the state highway through Gunns Corners and Depauville to Clayton, and thence to Alexandria Bay. At the hearing it developed that the intention was to operate also a line over

the same streets in the city of Watertown, and from the city limits through Gunns Corners, Stone Mills, Lafargeville, Fishers Landing, to Alexandria Bay.

The resolution granting the petition by the City of Watertown introduced in the case describes the route as "Watertown-Alexandria Bay Bus Line by way of Depauville, Clayton, and Alexandria Bay".

A hearing was had before Commissioner Van Namee in the city of Watertown on the 13th day of September, 1920, at which time certified copies of the petition presented to the City of Watertown by the petitioner, and a certified copy of resolution adopted by the city council of the City of Watertown on the 3rd day of May, 1920, certified by the deputy city clerk of the City of Watertown on the 22nd day of June, 1920, were presented and received in evidence. Also affidavits from the town clerks of the Towns of Clayton, Brownville, Orleans, Pamela, and Alexandria, in the county of Jefferson, showing that no resolution had been passed by the town boards of any of such towns, placing them under the provisions of section 26 of chapter 307 of the laws of 1919 of the State of New York, were presented and received in evidence. No affidavit was introduced to show that any of the villages through which the proposed route passes have placed themselves under the provisions of this statute, but the Commission can take judicial notice that no notices from any of such villages have ever been received by the Commission, so that for the operation of the proposed line by the petitioner no consent other than that of the City of Watertown, which he has already received, is needed precedent to this application for a certificate from the Commission.

At the present time there are three auto bus lines operating between Watertown and Alexandria Bay: one by way of Theresa operated by House & Vrooman, who have operated for the last six years: they have obtained a certificate for the operation from this Commission; one by way of Gunns Corners, Stone Mills, Lafargeville, Fishers Landing, to

No. 541 : 579

Alexandria Bay operated by the Alexandria Bay-Redwood Transportation Company, Inc., which has obtained the consent of the city and a certificate from this Commission in case No. 7587 on the 8th day of July, 1920. This route from Gunns Corners to Fishers Landing is not yet in operation, a state road being under completion for a part of the distance. The third line is the one operated by this petitioner from Watertown, Gunns Corners, Depauville, and Clayton to Alexandria Bay. The route to Clayton has been operated for about six years under permit and certificate, the extension to Alexandria about three years; but neither village being under the provisions of the so called auto bus law, no consents or certificates for the extension of the route were needed.

All of these routes charge the same fare for a round-trip, and the distance and running time is practically the same. They all travel on separate roads with the exception of part of the route proposed to be operated by the Alexandria Bay-Redwood Transportation Company, Inc., which from Watertown to Gunns Corners, a distance of nine miles, and from Fishers Landing to Alexandria Bay, a distance of six miles, operates over the same road as the Dailey line.

At the hearing the House & Vrooman interests appeared by Thomas Burns in opposition. The objection raised was only to the transportation of through passengers from Alexandria Bay to Watertown, it being contended that the House & Vrooman line having been in operation for a number of years should be protected from disastrous competition. It has been held by the Commission that it is not in the interest of the public to allow such competition as will result in the bankruptcy of the persons engaged in it. (*Matter of the Petition of the Alexandria Bay-Redwood Transportation Company*, Opinion No. 514, decided July 9, 1920.) Practical difficulties exist, however, in an attempt to limit through travel from Alexandria Bay to Watertown to the House & Vrooman line by way of Theresa. It would

seem that with these three routes extending from Alexandria Bay to Watertown, through different territories and by different roads, it would be an impossibility to enforce regulations forbidding any but the original company to carry through passengers from the Bay to the city of Watertown. A passenger from Alexandria Bay desiring to go to Clayton and to Watertown could take the Dailey buses from Alexandria Bay, and having completed his business in Clayton, proceed to Watertown. It would seem that as far as the Commission should go in this matter is to refuse to allow the actual paralleling of the route of any of these companies more than is now being done unless subsequent conditions clearly justify the existence of competing companies.

After a consideration of the evidence and due deliberation, and through the personal knowledge of the sitting Commissioner of the conditions existing in this section, it would seem that public convenience and necessity will be met by the issuance of a certificate to this petitioner allowing the operation of the proposed bus line in the city of Watertown through Gunns Corners to Depauville, Clayton, and Alexandria Bay, but forbidding the operation of so much of the line as would operate between Gunns Corners, Lafargeville, and Fishers Landing.

This decision will leave each of these three companies in a territory of its own, and as they will be free from destructive competition, the public will be benefited by a steady and regular service. An order in the usual form, and referring to the various restrictions contained in the consent granted by the city, should be issued accordingly.

All concur.

STEVENSON v. BALDWINVILLE LIGHT AND HEAT CO. 583
No. 542:583

In the Matter of the Application of EDWARD P. STEVENSON
against BALDWINVILLE LIGHT AND HEAT COMPANY, ask-
ing that its gas main be extended to furnish his residence
with natural gas. [Case No. 7487.]

1. Under section 62 of the Transportation Corporations Law it is the duty of a natural gas corporation to supply persons whose premises are within one hundred feet of its mains with natural gas under like conditions and for like purposes as it supplies other consumers.

2. The Commission can not refuse to enforce this obligation even though the supply is already inadequate to meet the needs of present consumers and can not be augmented.

3. The applicant's premises are within one hundred feet of a main formerly used as a high pressure main to convey gas from the wells to a governing station, but now disused as such and fitted to be used as a distribution main.

Held, That the applicant is within the provisions of section 62 of the Transportation Corporations Law.

Decided September 30, 1920.

Appearances:

Montague & Dodd, 702 Keith Building, Syracuse, for complainant.

Sullivan & Hall (by C. H. Hall), Baldwinsville, for respondent.

IRVINE, Commissioner:

The respondent supplies natural gas in the village of Baldwinsville, Onondaga county. The complainant has for a considerable period been endeavoring to obtain service on his premises within the village limits but the respondent has refused to give the service. Complainant now seeks the aid of the Commission. The premises of complainant are within one hundred feet of two gas mains of the respondent. These were originally high pressure mains leading from wells in the vicinity to reducing stations whence gas is distributed in larger low pressure mains. One of these high pressure

mains is evidently out of use for its original purpose because of the exhaustion of the wells which formerly supplied it. Apparently the other main is in the same condition. It is entirely practicable, at an expense no greater than is required for supplying service to consumers generally, to supply the complainant from one or the other of these mains. To supply him from the ordinary distributing mains would require the laying of more than three hundred feet of pipe. Section 62 of the Transportation Corporations Law in effect requires a gas company to supply service to any building or premises within one hundred feet of any main. The complainant is within one hundred feet of two mains, and while these were not originally laid for purposes of distribution, one at least is not available for any other purpose and may be used for that. It seems, therefore, that the complainant brings himself within both the spirit and the letter of the statute.

A practical objection based on serious grounds is presented by the respondent as its real reason for denying the service. The supply of natural gas is from a small local field. Gas has been drawn from this field for many years and has become scarce. Since the hearing, hearsay information has reached the Commission that a new well has developed a substantial new supply, but it can hardly be hoped that this supply will continue to be adequate to the needs of the community or that its needs will be met from time to time in similar manner. The supply has for some years been so short that no use has been made thereof for industrial purposes or even for domestic house heating in furnaces. In this state of affairs the officials of the company very candidly stated that they had pursued a policy of affording new service to premises adjoining their distributing mains only when they could not "bluff out" the applicant. As the use has already been restricted to the ultimate purposes for which a diminishing gas supply should ordinarily be preserved, it would seem that sound policy, if the Commission had discretion in the matter, would be to deny all extensions of service,

because any great addition to the present number of consumers would in all probability mean that neither the new nor the old consumers would have gas at any usable pressure. The Commission, however, feels that it has no discretion and must as a matter of law require the service to be supplied. At one time the Commission undertook by order to protect those who already had gas connections from the inroads of new consumers upon an inadequate supply. In *Park Abbott Realty Company v. Iroquois Natural Gas Company*, 187 Appellate Division 922, the Appellate Division of the Fourth Department held that the Commission was without authority to make such order, and sustained a writ of mandamus at the instance of an applicant for service requiring service to be rendered. Thereafter the Commission, where the same company had refused to make connections with new consumers located on streets where mains were already laid, instituted proceedings to compel such connections to be made. A writ of mandamus for this purpose was granted by the Supreme Court at Special Term, and affirmed by the Appellate Division, Fourth Department, *Public Service Commission v. Iroquois Natural Gas Company*, 189 Appellate Division 545. The judgment of the Appellate Division was affirmed by the Court of Appeals without opinion July 7, 1920. Unless, therefore, something has since occurred to enlarge the powers of the Commission in this respect, it must enforce section 62 of the Transportation Corporations Law, where the character of the use is the same as enjoyed by existing consumers, even though the effect of the enforcement may be to curtail a supply already inadequate. There has recently been enacted a statute [laws of 1920, chapter 540] designed to give the Commission certain authority for purposes of conservation, but none of its provisions affects the law as announced in the cases cited.

It follows that it is the absolute duty of the Commission to order the connection to be made and the complainant to be supplied on the same basis as other consumers, but the

order is made with reluctance and in the hope that there will not be further demands of similar character. To grant them in any considerable number would give to the applicants an unsatisfactory service and make the service to existing consumers less satisfactory than it is at present.

Chairman Hill and Commissioners Barhite and Van Namee concur; Commissioner Kellogg not present.

No. 543 : 587

In the Matter of the Complaint of RESIDENTS OF THE CITY OF OGDENSBURG AND OF THE INCORPORATED VILLAGE OF HEUVELTON *against* THE NEW YORK CENTRAL RAILROAD COMPANY, asking for better passenger train service to and from DeKalb Junction. [Case No. 7636.]

Passenger Train Service: The present passenger train service given by the New York Central at Ogdensburg is reasonably sufficient to accommodate the public, and the necessity and reasonableness of an additional morning train held not to be established.

While cost is not the determining factor and should be largely disregarded if an additional train is reasonably necessary, figures of former operation of such train and present cost are competent evidence.

The effect of extra passenger trains on single track roads on the freight service must be considered as a factor in deciding whether the present service is reasonable.

Decided September 30, 1920.

Appearances:

Roscoe C. Sanford, National Bank Building, Ogdensburg, attorney for complainants.

Thomas Spratt, Ogdensburg, attorney for respondent, with *James F. Akin* and *Edward Purcell* of counsel.

VAN NAMEE, Commissioner:

A petition signed by a number of residents of the city of Ogdensburg and the villages of Heuvelton and Rensselaer Falls was filed with the Commission on the 2nd day of August, 1920, asking that two extra passenger trains be operated between Ogdensburg and DeKalb Junction, one of these trains to leave Ogdensburg at 6:10 in the morning and to connect with passenger train No. 4 bound for Utica and points south on the main line, and the other to leave DeKalb Junction about midnight connecting with passenger train No. 3 bound from Utica and Syracuse to Massena.

The petition also asked that the city of Ogdensburg and the villages named "be given passenger service which shall be equal to that given to all the other cities, towns, and villages on the St. Lawrence division of the said railroad".

The hearing was held at Ogdensburg before Commissioner Van Namee on the 26th day of August, 1920. The peculiar situation of Ogdensburg, at the end of the division of the railroad, has been set forth in other orders and opinions of the Commission relating to passenger train service. (*Matter of Residents of Theresa*, case No. 7012, decided November 18, 1919.) The evidence shows that the city is now receiving as good passenger train service as any of the places of similar size nearer the larger cities and on the main line of the division. In addition to the five trains by way of DeKalb Junction furnished, the main line by way of Morristown has trains leaving for the south at 6:30 a. m., 9:45 a. m., 3:35 p. m., and 7 p. m. These made the connections for Watertown, Utica, Syracuse, and the east and west. Arriving from these points there are trains at 8:40 a. m., 11:50 a. m., and 7:40 p. m., making a total of seventeen trains arriving and departing from Ogdensburg daily.

Canton has but four trains a day in either direction; Potsdam and Gouverneur the same. Between Watertown and Syracuse there are but four trains in each direction daily. On this particular branch of nineteen miles between Ogdensburg and DeKalb Junction there are now five trains each way daily running on the following schedule:

	A. M.	A. M.	P. M.	P. M.	P. M.
Leave Ogdensburg.....	8:20	10:20	1:00	3:10	6:00
Arrive DeKalb Junction..	9:00	11:10	1:40	3:50	6:40
		P. M.			
Leave DeKalb Junction..	9:20	12:05	2:00	4:00	7:45
Arrive Ogdensburg.....	10:05	12:45	2:40	4:40	8:25

Sunday there are two trains each way, leaving Ogdensburg at 9:35 a. m. and 3:40 p. m.

At the beginning of the hearing the attorney for petitioners withdrew the request for the late evening train. The morning train desired would connect with No. 4, the main

morning train from Massena to points south, at DeKalb Junction, and would enable passengers to leave Ogdensburg at 6:10 and arrive at the principal stations on the main line north of Philadelphia, such as Antwerp and Gouverneur, approximately an hour earlier than if they took, as they must now do, the first train out of Ogdensburg on the main line at 6:30 a. m. As an example, a traveler could go from Ogdensburg on the proposed 6:10 train and arrive at Gouverneur at 7:28 a. m., whereas at present he is compelled to go on the 6:30 train by way of Morristown to Philadelphia and there change for the north, arriving at Gouverneur at 8:46. If the train requested were installed, there would in this instance be a saving in addition to the time of 66 cents in fare. The proposed train would also accommodate the morning papers published in Ogdensburg and permit them to arrive in some of the stations on the main line in advance of the morning papers from Syracuse and Utica. These are the practical benefits of the proposed increase in train service.

There has been previous experience with this train. It was first put on in September, 1908, and was abandoned in October, leaving five trains each way as at present. This schedule was maintained until November 30, 1913, when the early train was restored and the afternoon connection at 3:10 was abandoned. In November, 1914, at the request of the Ogdensburg Business Men's Association, the No. 8 connection was restored and the midnight train abandoned. The early morning train continued, however, until September 9, 1917, when the railroad abandoned it, giving as a reason light earnings and the necessity of a curtailment of operation. During the war period a further reduction of two trains was made, train No. 8 on the main line with which they connected at DeKalb at 3:50 p. m. being withdrawn. On January 27, 1920, No. 8 and its connections were restored, making a service of five trains each way as above indicated.

While cost is not the determining factor and should be largely disregarded if the additional train is reasonably necessary, still figures of former operations and present costs as offered by the railroad may be mentioned.

The train in 1908 carried an average of six passengers a trip. From October 30, 1913, to October, 1914, the average number of passengers per trip from Ogdensburg to DeKalb was nine, and on the return trip fifteen, per day. The average receipts per trip was \$4.20 from DeKalb Junction to Ogdensburg, and returning \$2.38 per trip. To operate the additional morning train from Ogdensburg to DeKalb Junction and return will cost \$339.30 per month for wages alone without any estimate of the cost of coal and up-keep. Roughly speaking, the cost of maintenance is more than twice any reasonable expectation of receipts from the run.

The history of this branch shows that the railroad company has been willing to experiment even at a loss with various trains to meet the needs of the community. The present timetable is the result of the meeting of a number of citizens of Ogdensburg and the railroad officials in April of this year, as a consequence of which the 3:10 train to DeKalb Junction, making connection with No. 8 for all points south, and also the 3:55 p. m. by way of Morristown which also makes all southern connections, were restored. Some discussion of the train in question was had at that meeting but its restoration was not strongly urged, it apparently being the majority opinion that the restoration of the afternoon train was more important.

The evidence presented at the hearing did not show any great public demand for the service requested. Of the hundred or more signers of the petition, but three appeared at the hearing. They were residents of Ogdensburg. No one appeared from the hamlets of Heuvelton, Rensselaer Falls, or DeKalb to urge this extension of service. These places have a population of from six hundred to seven hundred each, and it would reasonably seem that if this service were

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desired by their inhabitants some would have appeared at the hearing to give testimony to that fact.

On the other hand, the mayor of Ogdensburg, the president of the Chamber of Commerce, and various merchants of Ogdensburg swore that the present service was suitable and all that could reasonably be expected.

The effect of extra passenger trains on single track roads on the freight service, so important to this section, must also be considered as a factor in deciding whether the present service is reasonable.

The Commission, under section 51 of the Public Service Commissions Law, has the power in its judgment to order any railroad corporation to run trains enough reasonably to accommodate the traffic. It would be an abuse of this discretion to allow, under the present conditions and difficulty of operation, economic waste unless a fairly large number would be served thereby. The records of this train in the past, taken together with the present connections at DeKalb Junction, the limited traffic on the line, and the other train service in and out of Ogdensburg, and considering the general lack of interest among the very people who presumably would be benefited by it, forces us to the conclusion that the petition must be denied, on the grounds that the present service is reasonably sufficient to accommodate the public and that the necessity and reasonableness of an additional morning train has not been established.

An order denying the petition will be entered accordingly.

Chairman Hill and Commissioners Irvine and Barhite concur; Commissioner Kellogg not present.

Petition or Complaint of SEA CLIFF AND GLEN COVE GAS COMPANY under sections 71 and 72, Public Service Commissions Law, that this Commission fix higher maximum prices to be charged by said company for manufactured gas in the city of Glen Cove and the incorporated village of Sea Cliff, Nassau county. [Case no. 7588.]

This Commission may fix a maximum rate to be charged for commercial lighting above the rate limited by a local franchise (citing *South Glens Falls v. Public Service Commission*, 225 N. Y. 216).

A company giving a wholly inadequate service should not be granted an increase in rates until such service is improved. Under the circumstances of the case under consideration 8 per cent was held sufficient for a return upon capital, including allowance for surplus and contingencies. A "service" charge is fairer and to be preferred to a "minimum" charge.

Decided October 13, 1920.

Appearances:

Martin S. Decker, Esq., 180 Washington avenue, Albany, and *Elmer B. Sanford, Esq.*, 50 Church street, New York city, for petitioner.

Charles L. Wood, Esq., Sea Cliff, attorney for the Village of Sea Cliff.

KELLOGG, Commissioner:

The petitioner here, organized as a gas corporation under the Transportation Corporations Law, furnishes gas to the city of Glen Cove and the adjacent village of Sea Cliff. Its present charges are as follows:

Light, fuel, and power, Block meter rates:	Per M cu. ft.
First 10,000 cu. ft. used during the month.....	\$1.50
Next 5,000 cu. ft. used during the month.....	1.25
Next 35,000 cu. ft. used during the month.....	1.00
Above 50,000 cu. ft. used during the month.....	0.90

The consents under which it operates contain a provision that it shall not charge more than \$1.50 per thousand cubic

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feet. The company attempted by schedule dated March 30, 1920, effective May 1, 1920, to increase the aforesaid rates by 50 cents per thousand cubic feet. In view of the contract restrictions this was found to be invalid, and a temporary injunction having been obtained upon the complaint of the Village of Sea Cliff, the schedule was canceled and the maximum rate of \$1.50 restored.

It now comes before this Commission requesting it to increase the rates, and to exercise the authority which the Court of Appeals in *South Glens Falls v. Public Service Commission*, 225 N. Y. 216, held that it possessed in that regard. The petition came on for hearing at the New York office of the Commission on June 30, 1920. The Village of Sea Cliff, through its municipal authorities and counsel, objected to the granting of the increase. It did not base its objection upon the ground of the reasonableness of the rates now charged, nor did it assert that the company was amply compensated by such rates; but it did take the position that the service rendered by the company was so inadequate and so far below the proper service required by law and by the Public Service Commission that it was not in position to demand any increased rates. Investigation was made by an inspector of this Commission, who testified upon the stand, and from his evidence it appeared that the complaint of the village was justified, and it was felt by the sitting Commissioner that before the question of rates could properly be taken up, the service should somewhat approach the adequate service contemplated by law; and that before an order could properly be made fixing the rates, the company should put itself in position to render adequate service. The company acceded to this suggestion and proposed to install a "booster" to increase and render uniform the pressure. It was stated at the hearing that it would be installed probably in about a week. It was, however, not installed and in efficient operation until September. That installation having been completed, a further hearing was

held and the village authorities notified this Commission that they were satisfied with the service.

The question now, therefore, comes up of the propriety of granting the request of the petitioner for an increase in rates. The village offered no evidence affecting the question of the amount of the proper rate. The evidence in that respect was furnished entirely by the company. The burden of proof, however, rests upon it to establish the propriety of any increase of rate proposed in excess of the franchise limitation. The evidence shows that the service rendered by this company in each of the two municipalities, so far as the distribution system and consumption are concerned, is approximately the same. The demand upon the petitioner's resources is very much larger during July and August than during the other months of the year. That the petitioner is entitled to additional revenue, if obtainable, is shown by the fact that during the four months ending April 30, 1920, its operating expenses and taxes exceeded its total revenue by \$1631.67. In 1919 its revenue exceeded its operating expenses and taxes by the amount of \$664.45. In 1918 its operating expenses and taxes exceeded its revenue by \$3528.86; and in 1917 the excess of revenue over operating expenses and taxes was only \$238.53. The evidence shows that the cost of coal and oil necessary for the manufacture of the water gas produced by this company has very largely increased. Inasmuch as the Commission is asked here to fix the maximum price, it is necessary to consider in detail the value of the property and the probable cost of operation. Evidence has been submitted at length as to the present value of this plant. It is taken upon the basis of cost at the time of installation and not under present prices. It includes, in addition, a 15 per cent for engineering expenses and supervision during construction of most of the items. It also includes an addition of 6 per cent for interest during construction which has been applied to all of the items except general equipment, gas tools and implements, and gas

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laboratory equipment. This estimated cost seems to be reasonable and proper except as to charge for interest. The petitioner has not established here the probability of one year on the average being consumed in the construction of this plant. A careful consideration of the nature of the plant from the evidence in the record indicates that a charge of 3 per cent, or the interest for one-half a year, would fairly and amply cover this item.

The total amount for fixed capital claimed by the company is \$172,751.26; deducting \$4221.81, one-half of the interest during construction claimed, leaves \$168,529.45 as a fair estimate of the fixed capital of this company for the purpose of this proceeding.

Working capital to the amount of \$20,000 is claimed. It had on hand April 30, 1920, as working capital, \$18,177.98. This is practically the sum of the addition of the materials and supplies on hand as last reported, April 30, 1920, \$11,638.32, plus \$6500 the probable amount of bills receivable on the basis of the operating revenues for two months, assuming a rate of \$2 per thousand cubic feet. \$18,000 for working capital would seem to be a fair figure, which added to \$168,529, fixed capital, would make \$186,529 as a proper rate base.

The petitioner urges an addition to these figures of an allowance of 25 per cent for higher present construction costs. This claim can not properly be allowed. The statute under which we are acting, Public Service Commissions Law, section 72, provides —

In determining the price to be charged for gas or electricity the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard among other things to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies.

The return the company is entitled to is upon the capital actually expended. Even if it were not prohibited by

statute, it would hardly seem to be just to charge the rate-payers for an increase in cost of construction which would come under the present high prices but which was not incurred by this company. The company also urges that certain intangibles be added, amounting to 10 per cent of the installation cost. There has already been included 15 per cent for engineering and supervision during construction on the items to which such services could apply, and a further addition would be improper. Nothing can properly be added as "Going Value" because it does not appear that this company has any value in excess of the items already allowed. It has been estimated by the company that the operating expenses, including taxes and uncollectible bills, for the year 1920 will aggregate the sum of \$44,435. They also claim an allowance of the following items:

Reserve for renewals and replacements.....	\$1,500
Rent of leased apparatus.....	500
Amortisation of deficit suspense during about 12 years.....	5,000
Surplus and contingencies.....	8,000
Total	\$10,000

The first item is entirely proper and not excessive: it does not exceed 1 per cent of the value of the depreciable property and should be allowed. So also should be allowed the item of "Rent for leased apparatus". The "Amortization of deficit suspense during about 12 years" is not proper for consideration here. Neither should there be any further allowance under the conditions of this case for "Surplus and contingencies". This feature is considered in fixing the rate of return upon the capital actually expended which will be allowed this petitioner and thus full justice in this regard will have been done it. To the operating expenses, including taxes above stated, \$44,435, should be added the items for renewals and replacements and rentals of leased apparatus, aggregating \$2000, bringing the revenue to be secured to the petitioner to the sum of \$46,435. In order to secure to the petitioner this sum, together with an 8 per cent return on the rate base of \$186,529, a total revenue

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should be secured to it of \$61,357. The estimates in this case are based upon the theory that there will be a 20 per cent increase in business during the coming year. This seems to be conceded by all parties, due to the growth of the community accelerated largely by the housing situation in the city of New York, to which this is a commuting suburb. In order to distribute fairly this burden between the consumers there should be fixed a service charge and a consumption charge.

The petition and the practice of this company suggests a minimum charge per month. A service charge seems to be much fairer. Those expenditures which are necessarily required irrespective of the amount of consumption by the individual consumer should properly be borne by all the consumers irrespective of the amount of consumption. Where a minimum charge is fixed, which contains to some extent a charge for consumption, and for the balance of the charge a compensation for certain charges benefiting all consumers, the load of the latter charges falls entirely upon the smaller consumers. The difference which he pays between the charge for the gas actually consumed and the minimum charge, he pays for the charges in question, and the less he pays for gas the more he pays for those other charges. The burden therefore falls entirely upon the small consumers, and in the same proportion as the consumption decreases the burden of carrying those other charges increases. It was therefore suggested by the sitting Commissioner on the hearing that instead of a minimum charge a service charge should be substituted, and this met with the approval both of the company and the municipality.

The tabulation following has been made allocating the charges referred to which may properly be covered by the service charge, and which should be borne by the consumers irrespective of the amount of consumption.

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OPERATING EXPENSES ALLOCATED TO SERVICE CHARGE

	<i>Total 1919</i>	<i>Est. 1920</i>	<i>%</i>	<i>Service charge</i>
Work on meters and consumers' premises	\$932.01	\$1,118.41	100	\$1,118.41
Repairs gas meters	551.21	661.45	100	661.45
Commercial expenses	2,682.85	3,099.42	100	3,099.42
General administration	1,366.81	2,240.17	20	548.05
Insurance	746.76	896.11	25	224.05
General stationery and printing.	285.84	342.99	80	274.39
Store and stable expense.....	859.60	1,031.52	50	515.76
Taxes	1,457.84	1,749.41	30	524.82
Uncollectible bills	14.25	17.10	100	17.10
		<u>\$11,156.58</u>		<u>\$6,983.43</u>

FIXED CHARGES ALLOCATED TO SERVICE CHARGE

	<i>Total</i>	<i>% return</i>	<i>% Depre- ciation</i>	<i>Total %</i>	<i>Service charge</i>
Services	\$21,142.65	8	2	10	\$2,114.27
Meters	12,785.38	8	4	12	1,584.24
Fixed charges					<u>\$3,648.51</u>
Operating expenses					<u>6,983.43</u>
Total service charge.....					<u>\$10,631.94</u>
Estimated meters in service.....					1,200
Estimated service charge \$8.85 per year or $\frac{885}{12}$ = 74 cents per month per meter.					

As a matter of practical convenience, the small difference between this computed figure of 74 cents per month per meter and a more usual charge of 75 cents should be ignored and the service charge fixed at the latter amount. This will yield, on the estimated use of 1200 meters, at the rate of 75 cents per month, or \$9 a year, \$10,800. This leaves \$50,557, and deducting further estimated miscellaneous revenues of \$1095, leaves \$49,462 to be obtained from consumption charge. The probable consumption of gas from the best estimates available is 23,679 M cubic feet per annum. In order to obtain the revenue required on the foregoing petition, a maximum rate of \$2.09 per M cubic feet, in addition to the service charge of 75 cents, should be allowed.

These rates are fixed upon the present very high costs of materials. Indications are now apparent that these prices have reached their peak, a condition which has long been hoped for but which may not even yet be realized. The price of gas fixed upon these present prices should be only temporary in view of the franchise restrictions, and the

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power of this Commission to act and fix a higher price than that agreed upon between the parties at the time its rights were initiated should not be exercised except in a clear case. This rate should not be permitted to stand indefinitely in the future. The order fixing this rate as a maximum should by its own limitation expire on October 1, 1921, subject, however, at all times to the power of this Commission to modify it on the application of either party, in the meantime, should circumstances indicate that such modification is just and proper.

All concur; Chairman Hill presented an opinion, and Commissioner Van Namee also concurred.

HILL, *Chairman*, concurring:

I concur in the result arrived at by Commissioner Kellogg, but wish to state somewhat different grounds with respect to certain aspects of the record.

In rejecting the claim of the applicant that the amount of the investment should be arrived at by the acceptance of present day reconstruction costs, which are vastly larger than the original investment, instead of adhering to the latter, I prefer not to rest upon the literal reading of the statute which calls for a reasonable average return upon capital actually expended and also recognition of the necessity of making reservations out of income for surplus and contingencies. Other analagous statutes provide for a reasonable return upon the value of the property devoted to the public use, and the decisions of the courts indicate that under the eighteenth amendment it is questionable whether a statute which provides less than that is not in conflict with the fundamental law to the extent that it fails to provide it. The distinctive language of this statute has never been construed, and until it is I prefer not to rely upon it.

To prove a present day reconstruction cost, however, is in my opinion quite a different thing from proving a "value".

Cost is one thing and value is another. A reproduction cost is purely hypothetical as a measure of value. That the constituent elements of the property would today cost more than at some previous date does not establish as a fact that the combined and established property is actually worth more. It may be and may not be. The greatest value of these elements in a successful plant is their combined value as a going property. If the company could show that it could if it so desired secure for its property the alleged increased value, either as a whole or by selling piecemeal, or that it is worth more today in the market in any form, then there would be force in its contention that its value has increased and that by leaving the property in the public service a sacrifice of the realizable value is being made which should be the just measure of present value for rate making purposes. But when such is not the case it is difficult to recognize where the claimed enhancement has any existence in fact. If it is not there in any tangible sense, and if it is not capable of realization in any practical way, then I fail to see how it can be said to exist at all.

With respect to the 8 per cent return to cover both return upon capital and provision for surplus and contingencies, this to be sure is in conformity with an approximate standard to which the Commission has adhered with more or less constancy during recent years. I think, however, that the Commission, though reluctantly, must begin to recognize the distinctly higher level of interest rates on permanent loans which in recent months have been required in corporate financing. It is axiomatic that to preserve the financial soundness of public utility enterprises rates of return must be assured which will attract the flow of capital, and also that a corporation can not disburse in dividends its full earnings but must preserve a margin for contingencies and surplus. These considerations have recently received the attention of the United States Supreme Court, where it said —

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It is a matter of common knowledge that owing principally to the world war the costs of labor and supplies of every kind have greatly advanced . . . And it is equally well known that annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or for the future. (250 U. S. 256, 63 L. ed. 968, 39 Sup. Ct. Rep. 454.)

No service will be rendered by the Commission to the patrons of the utilities by a policy tending to impoverish and embarrass the latter.

In the light of these considerations an 8 per cent return to cover interest and dividend requirements as well as the margin which the statute provides for contingencies and surplus, can hardly be considered a dead line beyond which it is unreasonable to go. Rate making, however, is not a mere matter of formulas, and the facts of each case must be considered somewhat by themselves. In this case the proposed increase is very great (about 60 per cent), and the resulting price is quite high (\$2.09 per M cubic feet), and it is hoped the increase beyond the price of \$1.50 stipulated in the local franchise will be required only temporarily. Under these circumstances I agree in the propriety of declining to consider a rate of return in excess of 8 per cent.

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In the Matter of the Complaint of S. C. JAMIESON, Cashier
First National Bank of Norfolk, St. Lawrence county,
against NORWOOD AND SAINT LAWRENCE RAILROAD COM-
PANY as to passenger train service from Norwood to Nor-
folk, particularly mail service. [Case No. 7743.]

Where by far the principal activity of a short railroad is the movement of freight along its line, and its revenues are not sufficient to warrant the operation of more than one train to perform all of its duties as a carrier, its timetable may very properly be so arranged as to expedite as much as possible its handling of freight, although thereby its small passenger, express, and mail service is discommoded.

Decided October 13, 1920.

Appearances:

Fred J. Flannigan, Norfolk, attorney for complainant.

W. J. Fletcher, Norwood, attorney for respondent.

KELLOGG, Commissioner:

The complainant here, acting on behalf of the First National Bank of Norfolk, of which he is cashier, complains of the train service of the respondent between Norwood and Norfolk resulting in inconvenience to his bank and other patrons of the Norfolk postoffice. The controversy grows out of a change in time inaugurated by the respondent August 9, 1920. The timetable of the trains running daily except Sunday, effective from that date, is as follows:

<i>Northbound</i>			
	<i>1</i>	<i>3</i>	<i>5</i>
	<i>a. m.</i>	<i>a. m.</i>	<i>p. m.</i>
Norwood .....	....	9:15	1:20
Norfolk	5:45	9:30	1:50
Waddington	6:25	10:45	2:45
<i>Southbound</i>			
	<i>2</i>	<i>4</i>	<i>6</i>
	<i>a. m.</i>	<i>a. m.</i>	<i>p. m.</i>
Waddington	7:15	11:45	3:45
Norfolk	8:15	12:45	4:30
Norwood	8:40	1:00	4:45

The timetable preceding the one in question was put in effect by the respondent August 1, 1920. It was only in effect eight days. It somewhat curtailed the service now furnished and which had previously been furnished, but on account of the short duration of its effective period it is of no importance here and need not be considered. Prior to August, 1920, the company had rendered service under a timetable effective October 12, 1919, as follows:

<i>Northbound</i>				
	<i>1</i>	<i>3</i>	<i>5</i>	<i>7</i>
	<i>a. m.</i>	<i>a. m.</i>	<i>p. m.</i>	<i>p. m.</i>
Norwood .....	...	11:05	3:30	6:40
Norfolk	5:50	11:20	3:45	6:50
Waddington	6:30	12:20	4:25	...
<i>Southbound</i>				
	<i>2</i>	<i>4</i>	<i>6</i>	
	<i>a. m.</i>	<i>p. m.</i>	<i>p. m.</i>	
Waddington	6:40	1:50	5:00	
Norfolk	7:25	2:30	5:40	
Norwood	7:40	2:45	5:55	

The marked change in the running time of trains Nos. 3 and 5 give rise to the controversy here. As will be noticed, these trains were advanced so as to run about two hours earlier than had been the previous custom, the timetable of October 12, 1919, being substantially similar to those which had been in effect for many years past.

The mail service of Norfolk is dependent upon these trains. The mail arrives at Norwood from the south at 10:10 a. m. and 3 p. m., the morning mail being somewhat heavier. Norfolk is distant only about four miles from Norwood. Prior to August 9th last the trains, as will be noticed from the timetable above detailed, made substantially close connections and carried mail to Norfolk with reasonable expedition. It is true that the morning connection of train No. 3 was frequently somewhat delayed on account of the congested conditions of the tracks at Norfolk and their use by other carriers, but reasonably close connection was made and mail service was satisfactory. The result of these changes was to delay the mail which formerly arrived at Norwood at 10:10 and at Norfolk at

11:20, so that the same does not reach Norfolk station now until 1:50 p. m. The mail which arrives at Norwood at 3 p. m., which was formerly delivered at the station in Norfolk at 3:45 and was available that evening to the patrons of the postoffice, is not now delivered until the next day, arriving on the train which reaches the Norfolk station at 9:30, some sixteen hours after its arrival at Norwood. This delay in delivery of the mail is an inconvenience not only to this complainant but to many other patrons of the postoffice, although general complaint on the subject seems not to have been made. Close passenger connections also are abolished by this change of time. There seems to be no substantial local traffic by rail between Norwood and Norfolk except as to through passengers, and there is no general complaint as to this subject.

The control of the mail service and the duty of providing adequate transportation for that purpose rests primarily with the United States Postoffice Department, but it is a feature involved in the movement of passenger trains which should receive our consideration, at least incidentally. The delay in the mail service as above outlined is unusual and should not be condoned, and this company should be required to revert substantially to the old timetable unless other overruling conditions intervene.

The situation of this railroad is very unusual. Its physical, financial, and operating characteristics have lately been discussed and considered by this Commission in the proceeding of the *Remington Paper and Power Company, Inc., v. Norwood and St. Lawrence Railroad Company*, case No. 6844. It is eighteen miles in length, extending from Norwood, where it connects with the New York Central railroad and the Rutland railroad, to Waddington, on the shore of the St. Lawrence river. It was built to Raymondville, about seven miles from Norwood, in 1902, and was extended the remaining eleven miles to Waddington in 1907. It was constructed by the owners of the paper mills

along the line primarily for the purpose of transporting raw materials to these mills and their finished products from them. The major portion of its business consists in serving these mills whose owners constructed it, and had it not been for the requirement of these mills the railroad would not have been constructed. It is essentially in many respects an industrial railroad, serving these mills, and its other business as a common carrier is merely incidental. All of the trains on the timetables hereinbefore described have been served by the one crew and one set of equipment. For that purpose only one set of equipment is available, and the condition of the railroad and demands upon it indicate no need or fair demand for any additional train, requiring a substantial additional expenditure which would ultimately have to be borne by shippers and passengers. It is proper, therefore, that all of the demands upon this railroad, aside from the local movements around Norfolk, should be served by this one train and its crew. It appears that the change in timetable now complained of, from that in effect for many years, was due to the necessity of bringing cars to Waddington at more regular intervals in order to move the pulp wood, of which there is now a large movement, from that place to mills at Raymondville, Norfolk, and East Norfolk. This is the most important operation of the railroad, and as it must be operated for the benefit of the greatest number and for the promotion and adequate service of its principal business, it is necessary that minor considerations must be waived. The following table will show the comparative importance of its various services during the last four years:

	1916	1917	1918	1919
Freight	\$39,015.17	\$67,721.50	\$96,858.18	\$129,078.11
Passenger	9,684.88	9,186.40	6,582.68	8,485.17
Excess baggage.	72.25	87.04	13.54	29.10
Mail	984.26	1,043.45	1,064.26	1,064.16
Express	2,878.04	2,239.46	2,081.05	3,515.42
Milk	4,739.50	7,351.15	9,132.76	8,388.37
Switching	8,253.97	5,146.75	2,304.47	4,627.59
Special service train				35.00
	\$115,578.07	\$92,725.75	\$118,036.94	\$155,162.92

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	1914-1919	Per cent.
Total revenues	\$481,503.63	100.
Passenger	33,939.18	7.
Mail	4,106.23	0.85
Express	10,713.97	2.2

For the six months ending June 30, 1920, its total revenues were \$71,826.88, of which the passenger revenues were \$4647.60. Thus the percentage of passenger revenues during the current year, so far as reports are available, has decreased still further from the small 7 per cent which it bore during the four years preceding, a percentage less than one-third of the usual ratio of passenger revenues enjoyed by railroads throughout the State generally. The mail service which is discommoded and the express service which also must be measurably delayed, together, with that in former years, supplied only about 3 per cent of the entire revenues. Those activities are not segregated in the quarterly reports for the present year, but are presumably not increased over the ratio which it has maintained in the past. It must be seen that a very small percentage of the activities of this railroad are devoted to mail, passenger, or express service, and the overwhelming mass of business is transportation of freight. In this situation, of course, the proper thing for the railroad company to do is to discharge properly its duty in the transportation of freight, which stands in the ratio of about nine to one in importance to all its other activities. It appears that there is now a large quantity of wood at Waddington which it is important to transport to the paper mills along the line, and it was for the purpose of providing uniform service that the middle and afternoon trains were expedited, furnishing a more regular service of empty cars and transporting with more uniformity the pulp wood to the mills where it was to be consumed. There can be nothing of more importance to the industrial life of these communities than a proper service to these mills which constitute their principal activity, and the prosperity of all the inhabitants must be affected in no small degree by the activity and proper service of these large industries. Inasmuch, there-

fore, as the freight service is by far the principal feature of the activities of this respondent, and its other duties performed as common carrier are in a sense incidental, it would seem that the necessity for expedition in the mail and passenger service is of much less importance than the proper handling of the freight, and must, under the peculiar circumstances of this case, give way. There is some indication that the present necessity for a heavy movement of this pulp wood may be temporary. The St. Lawrence river will soon close and deliveries at Waddington will cease. As to how large a storage there is at that point which must be moved during the months of closed navigation is not apparent, but it is exceedingly probable that the need of this extra effort in behalf of the freight transportation at the present time may not continue through the Winter. As soon as the necessity for the present train movement inaugurated August 9th last ceases or becomes substantially less, it is strongly urged upon the officials of the railroad that the old schedule which has been in effect for many years be restored; and if that necessity does cease and the railroad does not make the proper change of time, this Commission should promptly entertain an application to order such restoration. In the meantime, however, under present conditions as above outlined, it would seem that the change of time is warranted. Although it undoubtedly results in inconvenience to the bank represented by the plaintiff, and undoubtedly to many others on account of delay in mail deliveries, the greatest good to the greatest number must be served, and the expedition of the handling of freight of this railroad must be assisted and not interfered with by orders here.

Under the conditions and for the reasons above set forth the complaint should be dismissed. The Commission, however, should be ready to reopen the case and give it further consideration in case there is a substantial change in the volume of pulp wood to be transported from Waddington.

All concur.

In the Matter of the Complaint of STEWART BROWNE, AS
PRESIDENT UNITED REAL ESTATE OWNERS ASSOCIATION
OF NEW YORK CITY, *against* NATIONAL DISTRICT TELE-
GRAPH COMPANY as to rates. [Case No. 7568.]

Telephone and Telegraph Corporations Defined: Definition of telephone and telegraph corporations contained in section 2, subdivisions 17-19, of the Public Service Commissions Law construed and applied.

Jurisdiction of Commission: A petition that the Commission assume jurisdiction over and regulate the rates charged by the National District Telegraph Company for night watch and fire alarm service, burglar alarm service, automatic fire alarm service, and sprinkler supervisory system service, dismissed for want of jurisdiction.

Decided October 13, 1920.

Appearances:

Stewart Browne, 280 Broadway, New York city, complainant, in person.

Francis R. Stark, 195 Broadway, New York city, attorney for respondent; *R. H. Overbaugh* of counsel.

C. H. Vanderbilt, representing the Board of Estimate and Apportionment of the City of New York.

VAN NAMEE, Commissioner:

In May 1920, Stewart Browne, as President of the United Real Estate Owners Association of New York City, filed with the Commission a complaint against the rates and charges of the National District Telegraph Company.

The answer of the company filed June 21, 1920, denies generally the jurisdiction of this Commission on the ground that it is not a telegraph or telephone company within the meaning of the Public Service Commissions Law.

A hearing was held in New York city on July 12th. Evidence was offered by the company showing the nature of its business and supporting its claim of lack of jurisdiction. Briefs were later filed, and this question now comes before the Commission.

BROWNE v. NATIONAL DISTRICT TELEGRAPH CO. 609

No. 546:608

The Commission has jurisdiction over certain telegraph and telephone companies as set forth in section 90 of the Public Service Commissions Law, as follows:

Sec. 90. *Application of article.* The provisions of this article shall apply to communication by telegraph or telephone between one point and another within the state of New York and to every telegraph corporation and telephone corporation.

Telephone and telegraph corporations are defined in section 2, subdivisions 17 and 19, of the Public Service Commissions Law, as follows:

17. The term "telephone corporation," when used in this chapter, includes every corporation . . . owning, operating or managing any telephone line or part of telephone line used in the conduct of the business of affording telephonic communication for hire; excepting, however, any corporation . . . having property actually used in the public service within the state of a value not exceeding ten thousand dollars, or which do not operate the business of affording telephonic communication for profit.

19. The term "telegraph corporation," when used in this chapter, includes every corporation . . . owning, operating or managing any telegraph line or part of telegraph line used in the conduct of the business of affording for hire communication by telegraph.

Is this company such a telegraph or telephone corporation as here defined?

This company was incorporated in 1902 under the provisions of article 9 of the Transportation Corporations Law relating to telegraph and telephone corporations. The business conducted by this corporation is of four general classes: a combined night watch and fire alarm service, burglar alarm service, automatic fire alarm service, and sprinkler supervisory service.

In the first class, night watch and fire alarm service, signal boxes similar to municipal fire alarm boxes are distributed throughout the building to be protected and connected on circuits with the company's central station. The watchman of the subscriber turns in signals at regular intervals which are recorded at the central station where operators

note them and transcribe them to record sheets which are sent to the subscriber in the morning to show him the service his watchman performed the night before. In case of fire a lever is pulled in the box which informs the central office, and it in turn informs the nearest city fire station. This is done both by an automatic transmitter connecting the central station in the fire house and by private telephone lines.

The burglar alarm service consists of a system of wiring connecting the doors, windows, and points of entrance to the protected premises on a line running to the company's central office. Any disturbance of this line causes a telegraphic automatic signal whereupon a watchman is sent to the premises and the police also notified of the location by private telephone line. The telephone line is rented from the New York Telephone Company, but does not go into a general exchange. The burglar alarm system does not generally comprehend the services of a watchman.

The automatic fire alarm service consists of an arrangement whereby an alarm is automatically transmitted by telegraph to the company's central station whenever the heat in a protected building exceeds a certain temperature. Upon the receipt of this signal at the company's central station it is handled the same as the fire alarm signal transmitted by a watchman.

The sprinkler supervisory system is designed to give an automatic telegraphic signal whenever the amount of pressure of water needed to maintain a sprinkler system for fire protection in a protected building falls below a certain point. This company does not install the sprinkler system, but installs a device attached to the gate valves controlling the water supply to the sprinkler. Upon this automatic telegraphic signal being received at the central office a runner is sent to adjust the valves so that the amount of pressure needed may be maintained. A signal is also sent automatically if the water in the gravity tank approaches the freezing point, and also signals if there is a break in the line,

or if the water is flowing. Signals show if this is due to fire, to a human agency, an accident on the line, or what not.

The company does not transmit any telegraphic messages commercially, nor engage in messenger service to transmit messages received telegraphically or telephonically. Thus in general it will be noted in all of these services, whether the communication is instituted automatically or by human agency, the work for which the company is paid by its subscribers is not completed upon receipt of the signal by the company at its central station. It agrees to and must perform a further service: in case of fire, by sending its own protectives; in burglary, by sending its watchman; and in the sprinkler system, by sending a man to adjust the machinery. That is, the service furnished by the company requires something more to be done by it than the mere transmitting of a message by telephone or telegraph.

The company has three central stations in New York city, one in Albany, Syracuse, Rochester, Buffalo, North Tonawanda, and Niagara Falls, but with the exception of the stations in New York city there is no interchange on the company's own wires or on leased wires between any of these circuits. In New York the entire telegraph and telephone lines and instruments used are leased from the New York Telephone Company; but in other cities the company leases the line, and installs its own instruments.

The schedule of rates fixed by the company is not fixed according to classes; each subscriber is a condition peculiar unto himself, and the rate is fixed with respect to the construction of the building, the distance from the central station, and other characteristics. The company does not take all risks offered, but considers each as to its desirability: the cost of installation, the type of devices used, the extent of the service desired, location, and other considerations. Most of the customers pay annually in advance, the majority being on five-year contracts.

Does this corporation, owning and operating such plant

and equipment, and rendering services as above described, become a telegraph or telephone company within the meaning of section 90 of the Public Service Commissions Law, which provides that the provisions of the article relating to telegraph and telephone lines shall apply to communication by telegraph or telephone between one point and another within the State of New York and to every telegraph corporation and telephone corporation. The jurisdiction of this Commission over telephone and telegraph companies is embodied in article 5 of the Public Service Commissions Law, added by chapter 173 of the laws of 1910.

The joint legislative committee appointed by the Legislature of 1909 to investigate telephone and telegraph companies submitted its report to the Legislature on March 21, 1910, and recommended legislation which resulted in the present article 5. The report shows no investigation of the affairs of the company in question, or companies of a similar nature. It is very apparent that in framing the report and the proposed laws which accompanied it the committee had in mind telegraph and telephone corporations which did a commercial business, or in which the sending and receiving of messages by these devices was the principal business of the company and its main source of revenue. On page 27 of volume 1 of the report the committee says:

The system of communication between the different parts of the country by telegraph and telephone is not only a modern convenience but has become a business necessity. It is the opinion of the committee that said business is such from its nature, that the public interest and private necessity require that it shall be operated in large enough units and over sufficiently broad stretches of territory so that its development need not require duplication of plant and service and unnecessary expense for maintenance, operation, or overhead charges.

This clearly does not extend to companies giving protective service of various kinds and in which communications by signals and automatic devices are an incident of the business.

The company in question filed reports with this Com-

mission for the years 1912 and 1913; but in 1915, in replying to a letter to the Commission asking for its annual report for the preceding year, it denied the jurisdiction of the Commission on the ground of the character of the business. Since that time no reports have been filed, and none apparently have been required by the Commission. This action does not bind the Commission in the present matter, but it indicates the position formerly taken by the Commission as to its jurisdiction. The recent decision of the Court of Appeals in the case of *Holmes Electric Protective Co. v. Williams*, 228 N. Y. 407, seems to indicate that companies similar to this one are or should be under regulation by the Commission. The court held that the company was a telegraph company and had therefore a right to use the streets without interference of the local authorities. The question of jurisdiction of this Commission was not squarely presented, but the majority opinion holds that the Holmes company is a telegraph corporation, and that while it may make special contracts with its customers and patrons in the absence of legislative regulation, yet its business, like that of other service corporations, is subject to legislative control. It does not hold flatly that such company is now under the jurisdiction of the Commission. There are two dissenting opinions which hold that the corporation was not a telegraph company, and it would seem that the majority opinion of Judge Crane would leave the matter open for decision by this Commission as to whether companies of this peculiar type, even though held to be telegraph companies because incorporated under article 9 of the Transportation Corporations act, are that kind of telegraph companies defined by section 2, subdivision 19, of the Public Service Commissions Law and over which this Commission now has jurisdiction.

Other states have made decisions in cases of this nature. Massachusetts has held that it had jurisdiction over the service of "stock ticker" companies. (*Stock Ticker* case, P. U. R. 1915, page 1068.) A comparison of the Massachu-

setts with the New York law shows that the Massachusetts statute definition of telegraph and telephone corporations is much broader. The Massachusetts act [acts 1913, chapter 784, section 2] gives the Commission jurisdiction over "transmission of intelligence within the commonwealth by electricity, by means of telephone line or telegraph lines or any other method or system of communication".

The Ohio Commission in the case of *Lang v. Western Union Telegraph Co.*, P. U. R. 1918, page 451, assumed jurisdiction over "baseball ticker service," but here again the utility act of Ohio, section 614, 2-A, is much broader than the New York act. The Ohio law provides that the term "public utility" shall include "telephone, telegraph, messenger and signaling companies". In that case the Ohio Commission recognizes a distinction between the telegraph company and a signaling company, saying "This is a service [meaning a signaling service] which a telegraph company is not bound to furnish to the public unless it voluntarily holds itself out to do so".

The Indiana Public Service Commission has decided the question before us squarely in the case of *J. F. Darmody Company v. American District Telegraph Company*, in a decision handed down on the 13th day of July, 1920, case No. 5084. This case was a proceeding similar to the one now before us, in which the Commission was asked to define the American District Telegraph Company as a public utility company within the meaning of the act and to assume jurisdiction over and regulate its rates. The American District Telegraph Company of Indiana furnishes a service similar to that furnished by the National District Telegraph Company of New York. The Indiana Commission, after describing the various kinds of service rendered by the company, holds that the services rendered are not such as are contemplated by the Indiana statute giving the Commission jurisdiction over telegraph and telephone companies, and that the petition must be dismissed for want of jurisdiction. It

will be noted that the Indiana statute conferring jurisdiction over business organized "for the conveyance of telegraph and telephone messages" is fully as broad as that embodied in section 90 of the New York statute.

The National District Telegraph Company is not a telegraph or telephone company organized for public purposes. It is engaged entirely in a private enterprise. It does not offer its services to any who apply; it selects the risks which it will accept. It does not offer communication from one part of the State to another; its branches are entirely separate and distinct. It does not receive or transmit messages of persons or property for hire; its business is the furnishing of protection to the special persons with whom it makes contracts, and in each case it makes a special contract with the persons or property it undertakes to protect. This company may be a telegraph corporation within the meaning of the Transportation Corporations Law and still not be that kind of a telegraph corporation over which the Public Service Commission was given jurisdiction by article 5.

The Commission should be slow to hold that the Legislature by words of general import intended to embrace within the meaning of the Public Service Commissions Law companies carrying on the business of private watchman and which use as a means of communication between itself and its subscribers telephonic or telegraphic apparatus. It is true that the business could not be conducted without the use of such apparatus, but the signals and communication by wire are only the means of setting in operation the forces and service for which the company receives its pay. The mere recording of the signals or the telegraphic communication would be of no value to the subscriber were it not followed by other action on the part of the company. It is therefore evident that the telegraph and telephone apparatus used by the company is only incidental and as a means of setting in motion the resulting service which it is the business of the company to render to its subscribers. It must be borne in

mind also that its subscribers can not even communicate with each other much less to the public in general. The telegraph and telephone service are merely signals to the company that something has happened to call for investigation by a watchman in furtherance of its contract. It is hardly a reasonable interpretation of the meaning of the law to say that this is a company conducting a business by "affording for hire communication by telegraph," or of "affording telephonic communication for hire," the definition of telegraph and telephone corporations in our statutes.

The Commission is of the opinion that the telegraph and telephone companies over which it has been given power of regulation are those generally recognized as such by the common understanding of man, and that it would be a violent interpretation of such understanding to hold that this company is generally recognized as either a telegraph or telephone company. It may be entirely proper for the State to assume the regulation of this and similar companies, but this should be done by a legislative act enlarging the provisions of the Public Service Commissions Law so as to confer undisputed jurisdiction upon the Commission. Therefore, the Commission holds that it is without jurisdiction over the respondent or the said matter of the petition, and that an order should be entered dismissing the petition for want of jurisdiction.

All concur.

No. 547:617

Petition of KINGSTON CONSOLIDATED RAILROAD COMPANY under section 184, Railroad Law, for approval of a declaration of abandonment of portions of its constructed route in the city of Kingston. [Case No. 7653.]

The petitioning company proposed to abandon certain parts of its street surface railroad which, although operated at a loss, have been in existence for twenty-seven years, and produced revenues in the year ended June 30, 1912, of \$94,569 out of total revenues for the entire road of \$202,635. The company claims that with the present six cent fare its entire operations are unprofitable. The public representatives state that they prefer an increase of fare, if upon investigation it is found to be necessary, rather than to have the proposed abandonments take place.

Held, that, in view of the large proportion of the revenue derived from the tracks in question and the extended period of their operation, their abandonment should be considered only as a last resort to furnish needed relief to the railroad company, and that the petition for approval of such abandonments should be denied, subject to further consideration after the merits of an increased fare application have been determined.

Decided October 13, 1920.

Appearances:

Howard Chipp, 280 Wall street, Kingston, and *Martin S. Decker*, 180 Washington avenue, Albany, for petitioner.

Palmer Canfield, Mayor, and *William D. Brinnier*, Corporation Counsel, Kingston, for the City of Kingston.

Francis C. Merritt, 38 Furnace street, Kingston, for Kingston Taxpayers Association.

HILL, Chairman:

July 21, 1920, Kingston Consolidated Railroad Company, a street surface railroad operating about eight miles of track in the city of Kingston, petitioned under section 184, Railroad Law, for the approval by this Commission of five sev-

eral declarations of abandonment of parts of the company's railroad, which had been adopted by its directors and stockholders pursuant to the requirements of said section.

Thereupon public hearings were given, and objections interposed on the part of the City of Kingston, and evidence taken bearing upon the merits of the application. Remonstrances against the proposed abandonments were filed by very large numbers of citizens, also by the Taxpayers Association of the city, said last named organization filing a formal answer.

During the pendency of the proceeding the Commission procured an examination of the operations of the petitioning company to be made by its division of electric railroads, which examination became the subject of a report made by said division, and put in evidence at a hearing on August 30th.

From such report and from the evidence and record, it appears that while five different portions of the track became the subject of the resolution of abandonment, the merits of the question turn upon the approval or disapproval of the three principal proposed abandonments, the others being of negligible importance. Of these three abandonments, two may be classed together, and described as the Hasbrouck Avenue abandonment, and the remaining one may be called the Clinton and Cedar Street abandonment.

The history of the railroad in brief is that it is a consolidation of two street surface railroads, one of which was built as a competitor of the other, and both catering in the main to the same general territory; that is to say, the city of Kingston consists of the two former villages of Kingston and Rondout. In or about the year 1870, what was then the Kingston and Rondout Railroad was constructed between these two villages by a very direct route along Broadway; and later on, in 1893, the road known as the Colonial City Electric Railway was built to compete with it, and roughly paralleling it by occupying

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Hasbrouck avenue and Cedar and Clinton streets. Later on the two roads were consolidated, and have ever since been operated as one system, although the operation of the cars has been found practicable only by operating one set of cars over the former Kingston and Rondout railroad, and the other set of cars over the former Colonial City tracks.

The above description is only general, the Colonial system having constructed further tracks from either end of the described routes, one extending to Kingston Point park on the Hudson river at what may be called the Rondout end of the system, and the other extending in Washington avenue at the opposite end of the system. Neither of these extensions is proposed to be abandoned and it is not important to consider them here.

Returning now to the Hasbrouck Avenue abandonment, we find that that track is about 6850 feet in length, and for about half its distance parallels the Broadway line at a distance of approximately five hundred feet northerly therefrom, and in its remaining length is from one thousand to fifteen hundred feet distant therefrom. In this latter portion there are extremely heavy grades on the streets which extend between the two railroads.

On the Clinton and Cedar Street extension the track at the farthest point from the Broadway line is about eighteen hundred feet distant therefrom, the extension itself being about four thousand feet in length.

Both of these portions of the track are in built-up districts of the city, and having been in operation for twenty-seven years it is but natural that the building development has taken place somewhat on the assumption of the continuance of their operation; this would be inevitable. It also appears that the abandonment would do away with the operation over several steam railroad grade crossings on the Hasbrouck division, and would eliminate the operation over some quite steep grades. The topography of Kingston is peculiarly uneven, especially in the eastern portion, which

accounts for these steep grades. In case of these abandonments the Washington Avenue track and the track to Kingston Point park would continue to be operated as a part of the remaining lines.

The report made by the division of electric railroads indicates that during the year ended June 30, 1920, the total railroad operating revenues on the so called Colonial division were \$94,569 against operating expenses of \$100,786, whereas on the Kingston City division such total revenues were \$118,066 against operating expenses of \$61,215. After deducting taxes on the respective divisions this shows a gross income deficit on the Colonial division of \$13,316 against a gross income on the Kingston City division of \$52,529.49. This report further estimates that with the savings in operating expenses and interest on capital which would be effected by the abandonment this gross income could be increased by about \$28,000.

This assumes that by rearrangement of switches and increased service on the Kingston City line there would be no net loss in traffic.

A study of operations for past years indicates that in a large measure this relative operating result of the two divisions has been constant in varying degrees from the time of the consolidation. In a word, it is quite clear that the Colonial division has never earned operating expenses, and that since the consolidation it has been carried on the back of the Kingston City division.

The evidence and the report developed many other facts which are important and have received attention, and would require consideration before the Commission could be justified in making an order approving the proposed abandonments, but in view of the disposition of this petition which the sitting Commissioner recommends, the facts above stated are perhaps sufficient.

From the foregoing statements it is at once perceived that although the Colonial division has never made operating

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expenses, it does afford facilities to a very large proportion of the patrons of the company. There is hardly a street railroad system in existence, especially in communities of the size of Kingston, which has a population of 26,000, in which similar or greater disparity in earnings on different parts of the railroad would not appear. It is at the same time apparent that the company is in need of some increase in revenue. The income account for twelve months ended June 30, 1920, apportioned between the Colonial and Kingston City lines is as follows:

INCOME ACCOUNT FOR 12 MONTHS ENDED JUNE 30, 1920

Apportioned between the Colonial and Kingston City Lines

	<i>Basis of apportionment</i>	<i>Colonial division</i>	<i>Kingston City division</i>	<i>Total system</i>
Operating income:				
Cash fares.....	Actual.....	\$91,956.96	\$113,259.84	\$205,216.80
Ticket fares.....	Actual.....	2,019.25	3,859.32	5,878.57
Chartered car earnings.....	Actual.....		24.00	24.00
Mail earnings.....	Actual.....		696.00	696.00
Total revenue from transportation.....		\$93,976.21	\$117,839.16	\$211,815.37
Advertising and other privileges.....	Actual.....	\$318.18	\$181.82	\$500.00
Interest revenues.....	Capital employed..	76.11	45.72	120.83
Miscellaneous rent revenues.....	Actual.....	200.00		200.00
Total non-transportation revenues.....		\$593.29	\$227.54	\$820.83
Railway operating revenues.....		\$94,569.50	\$118,066.70	\$212,636.20
Railway operating expenses.....	Car-miles.....	100,786.29	61,215.68	162,001.97
Net operating revenue.....		<i>*\$6,216.79</i>	\$56,851.02	\$50,634.23
Taxes accrued on electric railroad.....	Capital employed..	7,100.20	4,321.53	11,421.73
Gross income.....		<i>*\$13,316.99</i>	\$52,529.49	\$39,212.50
Deductions from gross income:				
Interest on funded debt.....	Capital employed..	\$20,651.00	\$12,569.19	\$33,220.19
Other interest deductions.....	Capital employed..	164.73	100.27	265.00
Amortization of discount on funded debt.....	Capital employed..	2,027.75	1,234.18	3,261.93
Miscellaneous debits.....	Actual.....		33.75%	33.75%
Total deductions from gross income.....		\$22,843.48	\$13,937.39	\$36,780.87
Net corporate income.....		<i>*\$36,169.47</i>	\$38,592.10	\$2,431.63

*Italics denote deficits.

The funded debt of the company is about \$600,000. The present rate of fare is six cents. Unless the gross income can be increased, even if we assume no more investment than is represented by the bonds, it is evident that the company is in need of a larger revenue.

The abandonment of portions of the track which yield so large a proportion of the gross revenue is, however, a very serious proposal from the viewpoint either of the company or of the public. The sitting Commissioner traveled over the lines several times at request of the parties. As pointed out, the topography of lower Kingston is peculiar, and the distances from the localities which would be deprived of their immediate facilities to the Broadway line are great. Furthermore, the distances from these localities to the business settlements which are located in the former villages of Rondout and Kingston, from different points on the line, are short. The results of operating the Broadway line alone might prove exceedingly disappointing, as many people who now ride on the Colonial division would undoubtedly find it preferable to walk distances of a mile or less rather than seek their way to Broadway. At any rate the abandonment should not be approved except as a last resort to furnish needed relief to the company, and in view of what follows, it is not necessary for the Commission now to commit itself absolutely as to whether or not on the present showing, without considering increased rates of fare, it would approve the abandonments.

At the final hearing it was stated by the attorney who ably represented the Taxpayers Association that in his opinion the residents of Kingston would much prefer to pay a higher rate of fare than to see any part of the road abandoned. It also appeared that an increase of from six cents to seven cents would, unless there were a falling off in traffic, yield the company additional gross income of about \$28,000. Whether or not the company requires as much additional gross income as would thus be derived is a question which

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will depend upon the amount of investment upon which it is entitled to a return and the rate of such return and other pertinent facts. It is neither necessary nor proper to pass upon that question here. The point is that here is an avenue of relief which may be a complete solution of the company's difficulties. While this suggestion was under discussion at the hearing, the mayor of the city, who was present, stated that in his opinion the majority of the people would prefer to pay an increased fare of seven cents rather than to have the lines abandoned as proposed.

Since that hearing the Commission is informed that the common council has passed a resolution to the effect that the city as represented by its authorities consents to an additional fare of one cent provided the Public Service Commission, upon an application duly made to it by the railroad company under the provisions of the Public Service Commissions Law, shall find upon investigation that the company is entitled to such increase. The Commission is also informed by representatives of the railroad company that it is about to make such an application to the Commission.

Upon this state of facts it seems clearly to be the duty of the Commission to dispose of this proceeding by withholding its approval from the resolutions of abandonment, and denying the application for such approval. In view of the fact, however, that the merits of the application for approval have not been fully determined, the order should provide that the application in this proceeding may be renewed after the disposition of such application as may be made for an increase in fare.

An order should be entered accordingly.

All concur.

Petition of ROCHESTER GAS AND ELECTRIC CORPORATION, former Rochester Railway and Light Company, for annulment of a provision of an order of the former Commission of Gas and Electricity, and as to price for gas furnished the public in the city of Rochester. [Case No. 7468.]

1. A rate for gas with a fixed base and varying automatically therefrom with the prices of coal and oil is not a proper rate as applied to general consumers.

2. A service charge whereby such expenses as are proportioned to the number of consumers and not to the amount of consumption are met by a uniform charge to each consumer is just and equitable. Barhite, Commissioner, dissenting.

3. The principle of the service charge, the method of adjusting it, and its merits as compared with a minimum charge discussed.

4. The operations of the Rochester Gas and Electric Corporation considered, and a service charge of 40 cents per month for each consumer authorized, with a maximum commodity rate of \$1.30 per thousand cubic feet of gas consumed. Barhite, Commissioner, dissenting.

Decided October 14, 1920.

Appearances:

Messrs. Harris, Beach, Harris & Matson, attorneys for Rochester Gas and Electric Corporation.

Charles L. Pierce, Esq., Corporation Counsel of the City of Rochester; and numerous citizens, customers of the company.

IRVINE, Commissioner:

The Rochester Gas and Electric Corporation asks permission to increase its rates for gas in the city of Rochester and adjoining territory. The company was formerly known as the Rochester Railway and Light Company, and in 1907 the Commission of Gas and Electricity fixed the maximum price for gas to be charged by it in the city of Rochester at

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95 cents per thousand cubic feet. Accompanying this there has been a minimum charge of 50 cents per month. The 95 cent rate applied to amounts of consumption embracing the needs of all ordinary domestic consumers. This petition asks that a service charge of 40 cents per month be substituted for the minimum charge, and that the commodity rate be increased under an order which shall permit its automatic adjustment from time to time according to the increase or decrease in prices of coal and oil. The reason for the application at this time is the allegation that under the enormously enhanced cost at present of materials and labor and especially of coal and oil the company's revenues under the old rates are inadequate. Assuming that the rate was properly adjusted in 1907 it might almost be presumed that it has now become inadequate, but unaided by such presumption the evidence abundantly demonstrates the fact. Before considering what the new rates should be it is important to determine whether on principle a rate variable from time to time in accordance with the fluctuation of particular operating costs is legal or proper and whether the service charge is a legal and desirable element of the rates.

THE VARIABLE RATE

During the late war sudden and extreme fluctuations in the price of coal led to many proposals to establish rates with a standard base and varying upward and downward from that base as the price of coal should rise or fall. This device appealed particularly to large consumers of electric energy, came to be known as the "coal clause," and crept into the power rates of many electrical corporations; and such rates are now in effect. Applied to such consumers, generally large consumers, with officials having the information and experience necessary to calculate their expenses with this clause in view, such rates have not been the subject of complaint, and it must be assumed that they have operated equitably and to the satisfaction of the electrical corporations and

the consumers as well. Whether they should be applied to the great mass of consumers may not present a different legal question, but certainly presents an entirely different problem as to justice and expediency. Underlying the rate provisions of the Public Service Commissions Law is the principle not only that rates shall be reasonable but that they shall be published, and to such a degree stable that the consumer may know in advance the price to him of the service to be rendered. This may to some extent be accomplished by the variable rate, that is to say, the period of stability may be such as to give the consumer the price for one, two, and three months in advance by basing, for example, the rate for any quarter upon the experience of the corporation for the preceding quarter. This hardly accomplishes the purpose of accommodating rates to rapidly fluctuating costs. By the method suggested the rate for a given quarter would be based not on the actual costs for that quarter but on the costs for the preceding quarter. In the long run the price paid by the consumer would be the average based upon costs in the different periods, but to accomplish this result no such device as that proposed is necessary. While the result might not be unjust to the permanent consumer and would be more just than a varying price based upon estimating future costs, the very uncertainty would be bound to cause discontent and suspicion. Furthermore, it is not only the price of coal and oil that have in recent years changed greatly. While these are very important elements in the cost of supplying gas, they are far from being the only factors. With the information provided by the record in this case and the basis of rates herein to be established, all that is desirable in the proposed scheme can be provided by fixing at this time the rate for a definite and short period with the provision that at the end of that period the company may apply at the foot of this order for an increase, or the Commission may, of its own motion or on complaint, reopen the inquiry with a view to making a reduc-

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tion. To facilitate this procedure the corporation should file with the Commission in such detail as may be required an income statement showing its revenue and its operating expenses, including not only the cost of coal and oil but all other expenses. Any readjustment that may be found necessary can then be made expeditiously and according to the method prescribed by the statute and the regular practice of the Commission.

THE SERVICE CHARGE

The service charge as the term is herein used is a uniform charge to all consumers, which together with another charge based upon the amount of gas consumed constitutes the entire rate to be paid. The service charge is not new although it has not as yet come into general use. It is sometimes called a readiness to serve charge and sometimes a consumer's charge. Its real nature does not seem to be generally understood by consumers, and unless it is understood it appears to them to be a mere arbitrary imposition in addition to the regular price also paid for what they consider the service supplied. It differs from the familiar minimum charge in that it is imposed on every consumer regardless of the quantity of gas used, while the minimum charge is practically imposed only upon those consumers using less than a certain quantity of gas, and becomes absorbed in the meter or commodity rate as soon as that quantity is reached. It was intended to serve the same purpose as the service charge but only did so to a limited extent and in a very crude manner. Its advent was greeted by an enormous storm of disapproval on the part of consumers. Its injustice was vehemently asserted, and because of its partial and discriminating effect the attack was not without foundation. It had sufficient reason behind it to enable it to resist the attack. It is now all but universal where the service charge is not applied, and it is an interesting fact that those who now resist the service charge are strenuous advocates of the minimum charge: some of them, probably, merely because they are accustomed to it;

others for reasons worked out as applied to their own bills by means of a lead pencil and a pad of paper.

The Commission has in a number of cases recognized the propriety of the service charge. The charge was approved in the Annual Report of the Commission to the Legislature in 1920 [page 84]. Circumstances in this case require a reëxamination of the principle involved and a clear statement of the nature and reasons for the charge and for its adoption in preference to the prevailing minimum rate. The Commission having been unable to complete its investigation for a final determination of the case, and the urgent need of the applicant for additional revenue demanding immediate relief, a preliminary order was made July 1, 1920, authorizing the installation of the proposed service charge of 40 cents per month, and that rate is now in effect. Recently complaints have been filed signed by a large number of consumers protesting against this charge and hearings have been accorded the protestants. This fact, together with the conclusion of Commissioner Barhite, contrary to that of the other Commissioners, justifies and demands a more extended discussion than would otherwise be warranted in view of the past acts and determinations of the Commission.

A moment's consideration must convince any one that every gas company is subject to a very considerable expense in the case of a person whose premises are connected with the company's mains, who has a meter installed, the valve open, and who uses no gas whatsoever. Suppose in any community that no patrons should in fact use gas for a period of one month. The plant of the company is there and yielding no return. It must to a certain extent operate in order that any one may have gas if he tries to use it. In fact the expense of the company would be substantially the same as in normal times except for the actual cost of producing the gas that would ordinarily be consumed during that period. To a degree this applies to the case of a single consumer who is, as the phrase goes, "connected up," but

who does not use gas for any particular period, as, for example, if his house be closed during a summer vacation. All expenses can now be ascertained through the accounts of the companies required to be kept according to a uniform system prescribed by the Commission largely for this purpose. In this way costs can be analyzed, and when so analyzed it is found that certain thereof vary directly and proportionately with the number of consumers, that is to say, the cost to the corporation of standing ready to serve is exactly the same whether the consumer and his family be away on vacation with the house closed or whether he be a large industrial consumer using many thousand feet a day. In addition to these items there are others where undoubtedly a great part of the total is likewise proportioned to the number of consumers and has no relation to the amount of gas consumed. In fact the only item of expense clearly and unquestionably dependent upon the amount of gas consumed and not in any degree upon the number of consumers is the cost of producing the gas and storing it in the holder.

It is elementary that the corporation is entitled to a fair return on the value of its property used and useful in the public service, or as section 72 of the Public Service Commissions Law states the rule "a reasonable average return upon capital actually expended". The corporation provides and installs meters and it bears the expense of the pipe from the main to the property line. Here is an investment upon which it is entitled to a return and which is constant whether gas is used or not used. Meters must be inspected and kept in repair and so must the service pipes. Meters must be read whether gas is used or not, accounts must be kept with the individual consumer and bills must be rendered and accounts collected. While the rendition and collection of bills is not regardless of whether any gas is consumed, the expense in nowise relates to the amount of the consumption, and it is, therefore, a charge which should be distributed among the customers as a total. Meters and services depre-

ciate regardless of the consumption and the total depreciation depends upon the number of meters and number of services. The size and extent of mains is largely related to the number of consumers, and theoretically, therefore, some proportion of the return on this investment and some proportion of the cost of maintenance and of depreciation should go into the service charge; but these items have also a direct relation to the amount of gas produced and used and in the absence of any satisfactory basis of apportionment it is better to refer them entirely to the commodity cost. The same is true of taxes. We might extend the inquiry to other less important items but enough has been said to illustrate the principle.

If we have nothing except a straight charge of a given amount for each hundred or thousand cubic feet of gas consumed, it is manifest that those who consume the gas are paying not only the cost of supplying them but they are paying the expense sustained by the corporation in holding itself ready to serve others connected up who use the gas not at all or in very small quantities. It should be of no concern financially to the corporation whether it receives its revenue in the form of a straight commodity rate, in the form of a commodity rate with a minimum charge, or in the form of a commodity rate plus a service charge. In any event it is entitled under the law to receive sufficient revenue in the aggregate to pay all its operating expenses under reasonable and economic management, to pay its taxes, to pay "a reasonable average return upon capital actually expended," and to make reservations out of income for surplus and contingencies [Public Service Commissions Law, Section 72]. This revenue to which it is entitled is a fixed sum to be paid by consumers in one form of rate or another, and the question involved is in nowise a question of greater or less revenue to the company but a question of distributing the fixed burden among the consumers equitably and without discrimination. From what has already been said it

must be clear that a straight commodity rate is inequitable, and if permitted at all should be permitted only under exceptional conditions where the inequity resulting is inconsiderable. The static cost above referred to can not, of course, be distributed with absolute justice and equity among all. The man who uses no gas but is connected up is not in precisely the same situation as a man who uses one hundred feet a month, and neither is in the situation of a man who uses one hundred thousand feet a month. A general basis must be found which will result in a minimum of inequality. The question, therefore, resolves itself into a consideration as to which of the two remaining rates is preferable: the minimum charge or the service charge. The expense to be paid being in great part exactly, and in the rest almost exactly, proportioned to the number of consumers, the service charge, made the same for each consumer, is indicated strongly as the proper rate. The indication is so strong that it may well be taken as controlling unless its opponents can in some way demonstrate the superiority of the minimum charge. The first point always made is that it is unfair to the small consumer. Commissioner Barhite asks, "Is it just or reasonable that the modest householder who requires a few hundred or a few thousand feet per month should pay the same amount to be applied to the general and constant expense of the company as the business man who requires hundreds of thousands of feet in the same time?" The answer to this question must be "No"; but the question involves the assumption that the service charge includes the entire general and constant expense of the company. The service charge should include only such parts of the expense as are incurred in maintaining the service proper as distinguished from supplying the commodity, and only that part that is the same or substantially the same both for the modest householder and the large business man. So stated, the answer to the question must be "Yes". It is said the service charge is irrespective of the benefit

received and has no relation to it, and that a railroad might as well charge a certain sum irrespective of the number of miles traveled. There is a distinct benefit received in having a commodity ready to use if desired, and if the patron desires this and if it costs the corporation money to satisfy his desire it is entitled to compensation. If a railroad company kept a special train on a sidetrack under steam ready to convey a party at any time and as often as desired from point to point, it might well exact a very considerable service charge. It is said that a very large percentage of the consumers are small users and yet pay the greater part of the amount which the service charge is intended to provide. They pay only their proportion. They pay as much and no more than the large consumer. They do not pay the greater part unless they are the greater number. The average consumption of gas in Rochester is 2700 feet. With a minimum rate of 50 cents and a commodity rate of \$1.45 the bill of the average consumer would be \$3.91. With a service charge of 40 cents and a commodity rate of \$1.30 his bill would be \$3.91. In the case of the minimum charge, the small consumer, as pointed out by Commissioner Kellogg in the petition of the Glen Cove and Sea Cliff Gas Company, decided herewith, pays the entire cost of the service so far as it is separated. He alone bears any burden because the commodity rate, if properly imposed, must be increased to cover that portion of the service cost not met by the very small consumer who pays the minimum bill. The opponents of the service charge deduce from these arguments in some manner that it works a discrimination against the small consumer, but every argument advanced applies with equal or greater force to the minimum charge. Assume a commodity rate of \$1 a thousand cubic feet and a minimum charge of \$1 per month. The man whose house is closed in the Summer pays \$1 and uses no gas. The very small consumer, probably a professional man in his office, uses, say, 100 feet and pays \$1. Another small consumer uses 900

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feet and pays \$1. Another uses 1000 feet and pays \$1. An industrial consumer uses 100,000 feet and pays \$100. No part of the cost of service is directly paid by any one who uses 1000 feet or more. The man on vacation pays \$1 service charge, and the assumed professional man in his office pays 90 cents. The small consumer thus pays a special charge for the service, and, because the commodity rate is higher than it would be under a service charge, he pays in addition a part of the service cost of the large consumer. If anything further is necessary to demonstrate the discriminations worked by the minimum rate, the following illustration, from a report of a committee of the Gloversville Chamber of Commerce, should be sufficient:

The minimum gas rate is inequitable. A sample case cited is the best proof. Mr. A. and Mr. B. are in the minimum class, which is placed, say, at \$1. Mr. A. uses 90 cents worth of gas a month; he pays \$1. Mr. B. uses 20 cents worth of gas a month; he also pays \$1. If the interest on the service investment to that residence or office is 50 cents, the company sustains a loss from Mr. A. of 40 cents that must be made up by some other consumer, while it has made a profit of 30 cents off Mr. B.

A single objection remains to be considered, and that is based on the law. Section 66 of the Transportation Corporations Law provides that no gas light corporation in this State shall charge or collect rent on its gas meters either in a direct or indirect manner. In *Buffalo v. Buffalo Gas Company*, 81 Appellate Division 505, it was held that a so called minimum charge was shown to be a meter rent only by evidence that it varied in proportion to the size of the meter. It is only by a straining of language that a service charge as above described, uniform among all classes of customers and depending upon the sum of all the expenses that are uniform, could be distorted into a rent, direct or indirect, for the gas meter. At the same time, it is possible that a factor in the service charge covering a return on the cost of the meter and its depreciation might be an indirect rental and for that reason should be eliminated from the

service charge although otherwise it ought properly to be included.

THE RATES

It is first necessary to determine how much the service charge should be. The following table, based on the evidence as to the actual expenses of the corporation, justifies the proposal of the petitioner to make the charge 40 cents a month:

COMPUTATION OF SERVICE CHARGE

Meter and installation work.....	\$17,683
Work on consumers' premises	23,865
Repairs to meters	21,925
Repairs to services	4,385
Commercial expense	126,481
Stationery and printing (90%)	8,734
General administration (22.8 of total, proportion of direct service cost to total direct expense plus stationery, general administration, and amortisation).....	25,762
Depreciation on services and installations (3%)	34,949
Depreciation on meters (3%).....	15,356
Total operating cost, service.....	\$279,090
Uncollectible bills	20,995
8% return on investment in services and installation, less depreciation	89,065
8% return on investment in meters, less depreciation.....	39,480
	<hr/>
	\$428,630

\$428,630

= \$5.36 annual service charge, or 44.6 cents per month.
80,000 (meters)

To remove any doubt as to the application of section 66 of the Transportation Corporations Law, there should be deducted \$54,836, the two items of return on investment in meters and depreciation of meters. This leaves \$373,794, which divided by 80,000, the number of meters in use, indicates a total charge of a fraction over \$4.67 a year, or 38.9 cents a month. While this very closely meets the theory of the petitioner it is not likely that it is the result of the same calculation. In the above calculation nothing has been included for distribution superintendence and supplies, insurance, accidents and damages, legal expenses and taxes, although unquestionably some portion of these accounts should go into the service charge if it were possible to make any reasonable apportionment thereof.

There has been no complete inventory and appraisalment of the property. In making the temporary order of July

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1st a value of \$8,435,891 was used. This was the book value according to the latest figures then obtainable and based on a minimum allowance for working capital. On further evidence with the capital accounts, fixed and working, adjusted to January 1, 1920, this figure is \$8,645,891. Checking this with information in the Commission's records in capitalization cases, it is deemed safe to accept this figure as the rate base.

Assuming then a service charge of 40 cents a month, the commodity rate may be arrived at, as follows:

Total operating expenses first eight months of 1920.....	\$1,963,023
Coal carbonized	\$583,005
Water gas oil	337,369
	<u>922,374</u>
Operating expenses, excluding residual credit and coal and oil cost	\$1,040,649
Reduced to annual basis 12/8.....	\$1,560,974
Coal carbonized, estimated at \$10 a ton.....	1,528,837
Gas oil, estimated at 14¢ a gallon.....	840,000
Estimated additional wages.....	125,000
	<u>\$4,049,311</u>
Residual credit, estimated at 25¢ per M cu. ft. made (first eight months 1920, 23.84¢) 3,100,000 x 25 =.....	775,000
	<u>\$3,274,311</u>
Taxes, excluding Federal income tax.....	190,000
Uncollectible bills	18,000
8% on \$8,645,891	691,671
	<u>\$4,173,982</u>
Necessary gross revenue for a "fair return".....	
Revenue from service charge, 80,000 meters at \$4.80 per annum.....	\$384,000
Miscellaneous revenue	30,000
	<u>414,000</u>
To be made up from consumption charge.....	\$3,759,982
Estimated sales, 2,945,000 M cu. ft. (5% loss of gas considered):	
3,759,982	= \$1.28 average return per M cu. ft. required.
2,945,000	0.91 average return per M cu. ft. 1919.
	<u>\$0.37 average increase in price of gas required.</u>
\$0.35 (present maximum price) + \$0.37 = \$1.32, the maximum price to be allowed.	

If no service charge were to be allowed the result would be —

\$4,173,982 — \$30,000 (miscellaneous revenues) = \$4,143,982.
 \$4,143,982
 \$2,945,000 = \$1.41, the average revenue required.

Deducting 91 cents, the present average revenue, leaves 49 cents per thousand cubic feet additional required to give

a proper revenue. This would make the maximum rate \$1.45 a thousand.

The above figures are merely a summary. An analysis of the several items presented would only serve to bewilder rather than elucidate. The summary is based on careful calculations of the detailed figures in evidence. These have been checked wherever possible and it is confidently believed that the results are correct.

It is not usual to fix gas rates more closely than in multiples of 5 cents for each thousand cubic feet. With a service charge of 40 cents a month the maximum commodity rate should be \$1.30 a thousand feet. The company has always supplied gas in large quantities to consumers at lower rates. These are availed of by industrial consumers. As the enhanced costs are referable almost entirely to production, the increase should theoretically be uniform to all classes of consumers. As in the industries gas competes with electric and steam power, it is probable that the large quantity rates are based on competitive factors. These large quantity industrial rates have not heretofore been fixed by the Commission and it is not desirable that they should now be fixed, but the increase in no class should vary more than 5 cents from the general increase of 35 cents a thousand computed to be required on the entire output.

Chairman Hill and Commissioners Kellogg and Van Namee concur; Commissioner Barhite dissents as to service charge, filing opinion.

BARHITE, Commissioner, dissenting as to service charge:

This is a request by the Rochester Gas and Electric Corporation for permission to increase its rates for gas. Since 1907 the company, under an order of this Commission, has charged at the rate of 95 cents per thousand cubic feet, with a minimum charge of 50 cents per month. This application asks for a modification of the Commission's order in two particulars, namely, that a 40 cents per month service charge

may be substituted for the 50 cents per month minimum charge, and that the rate for gas furnished may be increased, and hereafter from time to time increased or decreased dependent upon the price of coal and gas oil used in the business. The Commission held several hearings upon the application and full public notice of these hearings was given through the press and by advertisements inserted for that purpose. Practically no opposition was made to the application of the company, and as it was apparent from a most cursory examination of its affairs and from the knowledge in the possession of the Commission of the enormous increase in the price of labor and materials during the past two or three years, and of the rates allowed to numerous other gas companies after an examination of their affairs, which rates are far in excess of those allowed to the company interested in this proceeding, that the company was in immediate need of and entitled under the law to an increase in income, the service charge of 40 cents per month was temporarily allowed for a period of six months pending an examination of the affairs of the company to determine what increase if any should be finally allowed. Now, after the order made by the Commission has been put into effect, a determined opposition to the service charge has been made and some opposition to any increase in rates of whatever nature has manifested itself, and it becomes necessary to examine the whole subject before making a final order.

THE SERVICE CHARGE

Whatever may be said upon the above subject refers exclusively to gas companies. It would be outside the limits of the question now before the Commission to either condemn or approve of a service charge for all classes of public utilities.

This charge is based upon the theory and the fact that a company is at all times subject to expense whether a customer avails himself of its facilities to a greater or less extent

or uses no gas at all. The charge at times is very properly termed a "Ready to Serve Charge". If the expense to the customer is based entirely upon the amount of gas used by him, then the income of the company will vary greatly from month to month or from day to day, but its expenses, the cost of doing business, will remain substantially the same. The general overhead expenses, the number of workmen, the amount of materials on hand, must be such that the company at all times, at any moment, is prepared to furnish its product to any one connected with its mains. The above situation may mean that one month the company does business at a fair profit and the next month at a loss.

Is a charge of the character described just and reasonable and within the protection of the law? It must be remembered that a gas company, in fact any public service corporation, differs from a private business, among other things in that it can not of its own volition choose or limit the number of its customers. It is provided by the Transportation Corporations Law that a gas corporation must serve all persons within a certain distance of its mains, and by the Public Service Commissions Law that the Commission may order reasonable improvements and extensions of the works of the company. The State and not the company itself is the master of its activities, and while the State may compel the company to spend money it does not guarantee the company against loss on account of such expenditures. A company is so controlled by law that it is not fair nor right that it should be compelled at all times to be put to the expense of keeping its works in condition to serve its customers without the right to demand anything in return. But is the service charge the right and legal way in which to do justice to the company and at the same time preserve the rights of the consumer? The Rochester Gas and Electric Corporation has approximately 80,000 meters; its patrons use from a few hundred or a few thousand feet to hundreds of thousands of feet per month. In homes gas is used solely for

light, cooking, or general heating purposes; in business establishments it is used for light, heating, power, and in mechanical or chemical operations. Is it just or reasonable that the modest householder who requires a few hundred or a few thousand feet per month should pay the same amount to be applied to the general and constant expenses of the company as the business man who requires hundreds of thousands of feet in the same time? It is true that the large user of gas pays more in his consumer's charge than does the small user, but the service charge is separate and distinct from the consumer's charge. The latter is based upon the amount of service rendered; the former upon a fixed arbitrary standard irrespective of the benefit received and has no relation to it. A railroad under the same principle might charge a passenger a certain amount per mile and in addition exact a certain fixed sum irrespective of the number of miles traveled; or in private business a storekeeper might charge for the amount of goods purchased and add to that charge a fixed amount whether the price of the goods is ten cents or ten dollars. How long would a private establishment exist if its sales were based upon the method under discussion: it would at once be said that such charges were unjust and unreasonable, and yet under the law the test which must be applied to the rates of a gas company is to determine whether they are just and reasonable. A very large percentage of the consumers are small users of gas and yet they pay the greater part of the amount which the service charge is intended to provide. To the small consumer of gas the service charge adds a very considerable percentage to his yearly bill for gas; to the large consumer it adds practically nothing at all.

The service charge is clearly discriminatory. The law, subdivision 2, section 65 of the Public Service Commissions Law, provides "No gas corporation . . . shall directly or indirectly . . . charge, demand, collect or receive . . . a greater or less compensation for gas . . . or

for any service rendered or to be rendered or in connection therewith . . . than it charges, demands, collects, or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions". For example, the rate for gas is \$1 per thousand feet; the service charge is 50 cents per month: the person who uses one thousand feet of gas pays at the rate of \$1.50 per thousand feet; the person who uses two thousand feet pays at the rate of \$1.25 per thousand feet.

With the minimum charge the case is different. This charge is absorbed in the charge for the amount of gas used. It is simply a guaranty to the company of a certain amount of business per month. All consumers pay at the same rate for the gas used or for the service rendered. The only instance where this statement is not true is where the amount of gas used is so small as not to absorb the minimum charge at the regular rate, and such cases, unless the minimum charge is made unduly large, are extremely rare and would not make a case of unjust discrimination, and whether it is unjust discrimination the Commission has power to determine. [Public Service Commissions Law, section 66, subdivision 5.]

Under the present rate of 95 cents per thousand feet a customer must use about 526 feet of gas per month to absorb the minimum service charge of 50 cents so long in force. As the price of gas is raised the amount to be used to absorb the minimum service charge is decreased. The average monthly amount used by the customers of the Rochester Gas and Electric Corporation is 2750 feet.

I am well aware that the service charge against which my argument is aimed has been allowed by this Commission and by the Commissions of other States, and it may seem presumptuous to oppose such a weight of authority, but the reasons in opposition seem to outweigh those in favor of the charge.

The order of this Commission allowing the service charge for a period of six months should be vacated and a minimum charge allowed.

The company also asks by supplemental petition for an amendment of an order made by the Commission of Gas and Electricity on February 21, 1907, by which the maximum price to be charged for gas is fixed at 95 cents per thousand feet. That order has been in effect until the present time. The company wishes to establish a sliding rate or scale dependent upon the varying prices for coal and gas oil which may exist from time to time. The plan is to make a rate which shall yield to the company the deficit in net income necessary for a fair return on the investment in the gas department, from January 1, 1920, up to the time the order of the Commission becomes effective, and thereafter the increased cost of coal and oil over the base cost of those commodities established during the five months period from January 1, 1920, to May 31, 1920, shall be reflected in the rate to be established from time to time. The adjustment of rates is to be made once in every three months. If at the end of any three months it appears that the average cost of coal and oil during that period has been less than the established base rate, then that fact will reduce the rate for the subsequent three months and the consumer receive the benefit. The increased or decreased income from residuals sold by the company is to be taken into account in fixing the rate. It will be seen that the rate for the future in each instance is to be fixed, not upon the future prospective business of the company but upon the profits or losses of the past. However reasonable the plan presented may seem to be, the Commission must do its work within the lines of the statute. It is a statutory body and only has such authority as may be granted by the law and must keep within the limits of that authority whatever may be the beliefs of its members. Section 72 of the Public Service Commissions Law provides that the Com-

mission may conduct an investigation to enable it to ascertain the facts requisite to the exercise of any power conferred upon it. The section named further provides that the Commission may by order fix the maximum price of gas to be charged for the service to be furnished, and it is again reiterated that the price fixed by the Commission shall be the maximum price to be charged for gas for the service to be furnished within the territory. The statute is based upon future results and not upon the past. If the Commission is authorized to base rates upon a past deficit which arose during a period of three months, it might base the rate upon a deficit which has occurred during the past three years. Present customers should not be compelled to pay for shortages which have occurred at a time when they may not have been users of gas. It is not the purpose of the Public Service Commissions Law to allow the Commission to delve into the past to ascertain whether a company has received too great or too little return upon its property; it can not reduce the rate because it appears that the company has at some time prior to the present received a larger return than is fair and just, neither can it raise the rate because in the past the return has been too small.

In the present case, the order of the Commission fixing the rate was made over thirteen years ago. It is fair to assume that as the company has made no prior application to increase its rates the income received has been satisfactory. It is in evidence that the company has regularly paid its dividends until the present year when the great expense of conducting business has made necessary an application for a higher rate. In fact, the company in its petition states that the price of 95 cents per thousand feet fixed by the order of 1907 was fair and reasonable and produced a reasonable average return upon the investment under normal conditions, but that such price is no longer fair and will not permit the company to maintain the character of the service it has in the past and earn a fair return upon its investment. From

the company's own words it appears that its loss is of recent date. It may with propriety be said that from the knowledge which this Commission has of the affairs of the company, derived from a careful examination of its business at times when application has been made for different purposes, and from the reports filed at frequent and regular intervals, that the corporation appears during its existence to have been most efficiently and honestly conducted. But the prices of materials and labor which have so enormously increased during a recent period have added largely to the cost of conducting business. For illustration, the average price of coal has increased from \$3.054 per ton in 1914 to \$6.5575 per ton for the first eight months of 1920. In June, 1920, the average price of coal was \$9.40 per ton, and for the first twenty-two days of July, \$10.02 per ton. The price of oil has advanced from 4.575 cents per gallon in 1914 to 14½ cents during July and August of the present year.

What increase, if any, should the company receive?

No direct evidence of the value of the company's property has been given in this proceeding, but a most careful examination of the company's assets made by this Commission and brought down to a recent date has made a new examination unnecessary. The value of the property devoted to the gas business is \$8,645,891.

The estimated business of the company for the twelve months beginning October 1, 1920, estimated upon the actual facts and figures for the first eight months of the year, with such additions as are made necessary by the increased cost of labor and materials, are shown by the table which follows. Full credit has not been given to the company in all cases for present prices. The amount allowed for income upon property used in the business will be reduced by the amount of Federal income tax to be paid from that amount. No allowance has been made for that tax. The period fixed for the rate in the future should not exceed six months, so that at the end of that time application may

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be made by the company or by its customers for an increase or reduction in rate, as the condition of the business may warrant. The service charge should be abolished and the minimum charge formerly in force should be reinstated.

The table to which reference has been made is as follows:

Estimated operating expenses 12 months beginning October 1, other than for coal and oil.....	\$1,560,973
Estimated cost of gas coal at average price of \$10 per ton..	1,523,337
Estimated cost of gas oil at average price of 14¢ per gallon..	840,000
Estimated additional wages under new contract.....	125,000
	<hr/>
	\$4,049,311
Less residual credit estimated at 25¢ per M cu. ft.....	775,000
	<hr/>
	\$3,274,311
Taxes, excluding Federal income tax.....	190,000
Uncollectible bills	18,000
	<hr/>
Total revenue deductions	\$3,482,311
8% on \$3,645,891.....	691,671
	<hr/>
Necessary gross revenue for a "fair return".....	\$4,173,982
Miscellaneous revenue	30,000
	<hr/>
To be made up from sales of gas.....	\$4,143,982
$\frac{\$4,143,982}{2,945,000} = \1.41 average revenue per M cu. ft.	
0.91 approximate average revenue per M cu. ft. at present rates without service charge.	
<hr/>	
\$0.50 necessary increase in price of gas.	
0.95 present maximum price.	
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\$1.45 new maximum price.	

The estimate of the amount of gas to be sold during the coming year is based upon the production for the first eight months of 1920 reduced to a yearly equivalent, with an allowance of 10 per cent for increased production and a reduction of 5 per cent for leakage and other losses. These percentages are derived from the results of the company's business during past years.

A rate based upon the facts stated above will be fair to the customers and to the company.

In the Matter of the Joint Petition of the TOWN BOARD OF THE TOWN OF CUBA, Allegany county, and the BOARD OF SUPERVISORS OF THE COUNTY OF ALLEGANY, under section 91 of the Railroad Law, that an existing highway undercrossing of the Genesee River Railroad (now merged in the Erie Railroad) in said town be changed. [Case No. 4675.]

Grade Crossing Law: Section 91, Railroad Law, considered and its provisions construed:

The town board of a town within which an alleged dangerous undergrade crossing exists may petition for the elimination or changing of such crossing even though such crossing is situated upon a state highway and the State Commission of Highways refuses to bring such petition or to join with the town board in the same.

The Public Service Commission, by virtue of its position as the controlling and determining factor in all matters relating to a change of grade or alteration of existing crossings, has full power to order such alteration and to determine and apportion the cost of such alteration, under whichever subdivision of section 94 of the Railroad Law applies to the case in question.

Decided October 14, 1920.

Appearances:

H. E. Keller and *W. N. Renwick*, Cuba, as attorneys for petitioners.

G. R. James, 50 Church street, New York city, solicitor for Erie Railroad Company.

R. L. Turner, 50 Church street, New York city, as Engineer of Grade Crossings of Erie Railroad Company.

A. E. Rose, Albany, as Deputy Attorney-General, for State Commission of Highways.

J. O. Donnelly, Albany, as Engineer of Grade Crossings, State Commission of Highways.

VAN NAMEE, Commissioner:

This case was brought before the Commission on the joint petition of the town board of the Town of Cuba, Allegany

county, and the board of supervisors of such county, for a changing, under section 91 of the Railroad Law, of an existing state highway under-crossing of the Genesee River railroad in such town.

The Genesee River railroad has been absorbed by and is now a part of the Erie railroad system. The highway was not a state highway at the time the railroad was constructed across it but has since been included in the state highway system and improved with state funds.

The question arises as to the jurisdiction of this Commission under the joint petition. This proceeding was originally commenced in 1914 by a petition from the town board of Cuba. It was made case No. 3582. On October 27, 1914, by order of the Commission, the petition was dismissed on the ground that the "proceeding was irregularly brought, for the reason that it should have been instituted, if at all, by the State Commission of Highways". Subsequently, and on the 10th day of November, 1914, this order was amended by striking out the words "by the State Commission of Highways," and inserting in place thereof "pursuant to the provisions of section 91 of the Railroad Law as amended by chapter 378 of the laws of 1914".

According to the interpretation of section 91 by the town board and the board of supervisors, the petition could have been brought either by the town board or by the State Commission of Highways. The State Commission of Highways refused to proceed on the ground that no funds were available, and this petition was therefore filed jointly by the town board and the board of supervisors on December 8, 1914. The petition states that public safety requires the alteration and alleges that a highly dangerous condition exists. On account of the war, the period of government control of railroads, and subsequently the lack of available funds both by the State and by the railroad, no hearing for a determination of the merits of the case was had until September 1, 1920, at which time this question of the right

of the town to bring this petition was raised both by the State Commission of Highways and the Erie Railroad Company.

The Genesee River railroad was built about fifteen years ago. In October, 1906, the Board of Railroad Commissioners of the State determined under what was then section 60, now section 89, of the Railroad Law the manner in which this new railroad should cross existing highways in the various towns through which it passes, and as a result of this order this then existing town highway was changed in location, a part of the existing highway was abandoned, and a new piece constructed in accordance with the plan. This highway was then a comparatively unimportant one, and a new piece carrying the tracks under the railroad by a subway was constructed in accordance with this plan. The subway is located at right-angles to the railroad which here runs in an easterly and westerly direction. The old highway ran in generally the same direction as the railroad and the crossing was at a slight angle and on a tangent. As changed, the road takes a sharp angle and enters the subway running in a northerly and southerly direction, making it impossible for persons driving teams, automobiles, and other conveyances, traveling in opposite directions, to see each other until they enter the subway.

This highway was later included in the state system of highways and has been improved by state funds and is now a part of state highway 5174. What is desired is to have that portion of the state highway now constructed which crosses by an under-crossing at right-angles abandoned and a new subway and roadway constructed on approximately the line over which the old highway ran.

The town board contended that even though this was a state highway it could bring the petition for this change and the cost should be assessed half on the railroad and half on the funds of the State Commission of Highways, as provided by subdivision 4 of section 94. The State Commission of

Highways and the railroad company both opposed this contention, holding that where changes or alterations to a state highway were involved none but the State Commission of Highways and the railroad could bring the petition in the first instance; that they being the parties in interest — those who would have to pay the cost of such change — were the only parties who could initiate the proceedings.

Under section 91 of the Railroad Law as amended by chapter 378 of the laws of 1914, "the town board of any town or the board of supervisors of any county . . . within which a . . . highway is crossed by a steam surface railroad . . . above grade by structures heretofore constructed . . . may bring their petition in writing to the Public Service Commission, therein alleging that public safety requires an alteration in . . . the location of the crossing, a change in the existing structure by which such crossing is made . . ." In the second paragraph of section 91 it is provided that "where a . . . highway . . . in a town or county, which crosses or is crossed by a steam surface railroad at grade, below or above grade, is a part of a highway which the State Commission of Highways shall have determined to construct or improve as a state or county highway, such Commission of Highways may bring a petition containing any of the allegations above specified and praying for a like order".

The first paragraph allows the petition on the ground of public safety and as to existing highways without a distinction as to whether they are constructed or improved by state funds or not; the second because the State Commission of Highways has determined to construct or improve a highway and then obviously only as to the roads which it has determined to construct or improve. This distinction is important.

These two paragraphs show an intention to distinguish between roads in a town or county, not a part of the roads improved or constructed as a state or county highway. Where the road to be improved is not a state or county highway,

the town board may bring the petition and the State Commission of Highways has no authority either to bring or to join in it. It would hardly be reasonable to suppose that the State Commission of Highways could intervene in the improvement of a road in a town or county over which it had no control unless the road is made a part of the improved state and county highway system. Therefore, the first paragraph of section 91 specifies those bodies and those only which are authorized to bring such a petition, and then only because existing conditions will be improved on the ground of public safety.

The second paragraph specifies that where the road to be improved or changed is a part of a state highway the petition may be brought by the State Commission of Highways. That is, it enlarges the number of those who may bring the petition in certain cases. If "may" were "shall" there would be no question but that the State Commission of Highways would be the only body having the right to bring the petition where changes of state highways were intended. Then the direction would be mandatory and the State Commission of Highways must bring the petition. But the word is "may," signifying a discretion. If the State Commission of Highways does not choose to act and the public safety is involved, who may?

The first portion of section 91 does not except state highways in any way from those which town boards may on account of "public safety" petition to have improved. It says "the town board of any town . . . within which a street, avenue, highway or road crosses or is crossed by a steam railroad" may petition. This is inclusive of all highways, whether improved by the State or not. This must have been the intention of the Legislature. But to provide for the work being done in the improvement of the highways by the State an additional paragraph was added by which the Highway Commission was given the power itself to petition for changes on a road which it intended to improve or had

improved. This was optional with the department and could not take away the right of the local authorities to petition for a change of the highway on the ground of public safety.

The history of this section clearly shows the intention. Section 62 of the Railroad Law, as added by chapter 754 of the laws of 1897, contained the first paragraph specified above. Minor amendments were made by chapter 520 of the laws of 1898, and by chapter 359 of the laws of 1890, but it was not until the amendment of chapter 153 of the laws of 1909 that the second paragraph relating to the permissive right of the State Commission of Highways to petition in certain cases was added. By chapter 378 of the laws of 1914, section 62 became section 91, and so continues at present. Thus originally the State Commission of Highways had no power under section 91, and when power was given it the power was not exclusive power for no words appear showing an intention to limit the powers already conferred upon the local municipal authorities.

Surely then it could not have been the intention of the Legislature to prohibit any but the State Commission of Highways from petitioning for changes which involved a state highway; otherwise the Legislature would have inserted words giving the exclusive right and also have limited the Public Service Commission itself in its power under section 95 of the Railroad Law to order changes in the absence of an application or petition therefor and when in its opinion public safety requires it.

The Railroad Law as originally enacted by chapter 565 of the laws of 1890 became chapter 39 of the General Laws. With amendments made up to that time but without substantial change, it became, in 1910, chapter 481 of the laws of 1910 and chapter 49 of the Consolidated Laws. The Public Service Commissions Law on the same day became chapter 480 of the laws of 1910 and chapter 48 of the Consolidated Laws. The two acts are to be construed together and constitute one harmonious system applicable to the subjects to

which both relate. (*People v. P. S. C.*, 170 A. D. 607; affirmed by memo. 218 N. Y. 643.)

The Commission holds it is not the intention of the State to prohibit this town from moving to eliminate a dangerous crossing nor this Commission to order such elimination, and the changing of an existing highway even though a state highway, in the absence of a petition from the State Commission of Highways. The Public Service Commission, by virtue of its position as the controlling and determining factor in all matters relating to a change of grade or alteration of existing crossings, has full power to order such alteration or changing and to determine and apportion the cost of such alteration under whichever subdivision of section 94 applies to the case in question. (*People ex rel. Town of Scarsdale v. Public Service Commission*, 173 A. D. 164; and 220 N. Y. 1.)

Therefore, it would seem in the present instance that this petition may be brought by the State Commission of Highways, it being the alteration of a state highway, but failing in such action on the part of the State Commission of Highways, the town board has a right to petition for such alteration on the ground of public safety; and if after a hearing the Commission finds that such alteration and changing is in the interest of public safety, the cost should then be borne under the provisions of subdivision 4 of section 94, and the fact that the State Commission of Highways has no funds available for such purpose does not prohibit this Commission from determining the necessity of such change. (Report of the Attorney-General [1904] 248.)

As one-half of the expense is borne by the railroad, whether the cost is divided under subdivision 3 or subdivision 4 of section 94, its position is not changed nor its liability increased by this decision. As it is a party in interest in any proceeding under section 91, it may itself bring the petition to the Public Service Commission under the same conditions which allows either the State Commis-

sion of Highways or the local authorities to bring a proceeding. The joining of the board of supervisors in this petition is surplusage. They could not have brought the petition in the first instance as the Town of Cuba and not the County of Allegany is the municipal corporation within which the crossing is situated. (*People ex rel. Town of Scarsdale v. Public Service Commission*, 220 N. Y. 1.) The Commission therefore determines that the State Commission of Highways, not having exercised its undoubted authority to bring about the changing of this crossing, this town board had authority, under section 91, to bring such petition, and that further hearing should be held to determine whether public safety requires this proposed alteration and changing. If after such hearing the Commission decides this to be the fact, the costs should be borne under the provisions of subdivision 4 of section 94.

Therefore, the motion to dismiss the petition for lack of jurisdiction must be denied and a time set for a further hearing as to the necessity of such proposed changes.

All concur.

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In the Matter of the Complaint of RESIDENTS OF FREEPORT, L. I., *against* NASSAU AND SUFFOLK LIGHTING COMPANY as to insufficient pressure of gas. [Case No. 7702.]

In the Matter of the Complaint of ROCKVILLE CENTER BUSINESS MEN'S ASSOCIATION AND CUSTOMERS IN THE VILLAGE OF ROCKVILLE CENTER *against* NASSAU AND SUFFOLK LIGHTING COMPANY as to insufficient pressure of gas. [Case No. 7749.]

In the Matter of the Complaint of AMBROSE JENSEN of the incorporated village of Rockville Center, L. I., *against* NASSAU AND SUFFOLK LIGHTING COMPANY as to insufficient pressure of gas. [Case No. 7776.]

In the Matter of the Complaint of the TRUSTEES OF THE VILLAGE OF ROCKVILLE CENTER, L. I., *against* NASSAU AND SUFFOLK LIGHTING COMPANY as to insufficient pressure of gas. [Case No. 7790.]

Decided October 14, 1920.

Appearances:

Walter R. Stout, 278 South Long Beach avenue, Freeport, representing complainants in case No. 7702.

Mrs. C. R. Stoughton, *Mrs. D. D. Martin*, and *Mrs. W. B. Stout*, South Long Beach avenue, Freeport, in person.

Francis G. Hooley, Rockville Center, as attorney for complainants in cases Nos. 7749, 7776, and 7790.

Robert W. Nix, 281 Washington street, New York city, and *Ambrose Jensen*, Rockville Center, complainant, in person.

Henry MacDonald, 85 Liberty street, New York city, as attorney for respondent.

George MacDonald, as President of respondent, 149 Broadway, New York city.

BARHITE, Commissioner:

This is an application by the complainants in each of the four cases noted above, for relief on account of the insuffi-

cient pressure of gas furnished by the defendant company. The situation as disclosed by the evidence of the complainants is a dangerous one. The gas may be lighted and in a short time the pressure drops to such a point that the flame ceases, and then the pressure returns and the gas pours out of the open burner into the room. Even when the flame does not become extinct there is so little heat that it is impossible to cook food. One hotel keeper whose place of business is in Rockville Center testified that during the past Summer he was obliged to send guests away because he was unable to prepare the necessary meals. It appears that insufficient pressure of gas is a condition which has prevailed to some extent for over a year, but it has grown worse, until the customers of the company have sought relief. The company admits the poor pressure and explains that the trouble arises from the fact that the locality is growing rapidly in the number of customers seeking service from the company and that its facilities have not been sufficient to take care of the load during peak hours. In other words, certain pipes are not large enough to carry the required amount of gas. There is also the suggestion that salt water may have leaked into the pipes and interfered with the flow of the gas. Although the Commission a short time ago made an order allowing the company to issue additional bonds, and in that order provided that a very substantial amount should be used for laying new mains, the company states that the main required to correct the difficulty under discussion was not taken into consideration in the order. The main was not mentioned in the application for the order.

Only one conclusion can be drawn: the present situation must be corrected. Either larger or additional pipes must be laid; or if the trouble is in any degree caused by the presence of water, then the water must be removed and steps taken to prevent further trouble from that source. Danger from explosion and to the health and lives of residents of Freeport and Rockville Center from causes which can be remedied

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must not be allowed to continue. The company knows well what changes, improvements, or additions are required ; to it will be left the solution, but satisfactory results must be reached.

All concur.

Petition of ARTHUR J. HOUSE under chapter 667, laws of 1915, and chapter 307, laws of 1919, for a certificate of public convenience and necessity for the operation of a stage route by auto buses in the city of Watertown and the incorporated village of Adams, Jefferson county, as a part of a route to Pulaski. [Case No. 7814.]

Auto Bus Line: Certificate granted for operation of auto bus line between Watertown, Adams, and Pulaski.

Expiration of Certificate of Commission: The Commission could and now can limit the time for which certificates are issued to coordinate with the termination of local consents.

Regulation of Timetable and Rates of Fare: The Commission has power over auto bus lines as common carriers to regulate their timetables and rates of fares, and if after regulation by the Commission these are not maintained as ordered, the Commission may revoke its certificate allowing such operation.

Decided October 26, 1920.

Hearing at Watertown, October 8 and 9, 1920.

Appearances:

Thomas Burns, 139 Arsenal street, Watertown, as attorney for petitioner; *Arthur J. House*, Watertown, who also appears in person.

N. F. Breen, Watertown, as attorney for the Village of Adams.

Carlisle & Brown (by Henry M. Brown), 311 Sherman Building, Watertown, as attorneys, and *Fred B. Pitcher*, Watertown, of counsel, for Albert F. Warner, in opposition.

VAN NAMEE, Commissioner:

Arthur J. House filed a petition asking for a certificate of convenience and necessity for the operation of an auto bus route between the city of Watertown and the villages of Adams and Pulaski. The distance from Watertown to Pulaski is approximately thirty-three miles, and Adams is about half

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way between the two points. On the hearing at Watertown held October 8 and 9, 1920, the granting of the certificate was vigorously opposed by Albert F. Warner, but was urged by counsel representing the Village of Adams.

For a number of years lines of auto buses have operated between Watertown and Adams and Pulaski, but until the Summer of 1920 no village or town on the route in question had placed itself under the provisions of chapter 307 of the laws of 1919. On August 1st a resolution previously adopted by the board of trustees of the Village of Adams placing itself under the provisions of the law took effect, and on August 9th the board gave consent to the petitioner for his desired operation, and on August 16th gave consent also to Albert F. Warner for operation over the same route.

The consents to House and to Warner were both for a period of five years from August 1, 1920. Both the petitioner and Warner have the consent of the City of Watertown for operation over the same streets in the city as a part of this route granted May 3, 1920, for a period of five years from April 1, 1920. Warner's application to the Commission for a certificate was filed a short time before that of House, and Warner received his certificate of convenience and necessity on August 24th.

House opposed the granting of Warner's application as vigorously as Warner now opposes House. Both have complied with the requirements and regulations imposed in the consent from the City of Watertown and the Village of Adams. Therefore, both are before this Commission practically at the same time, and stand identically the same as far as any rights, consents, or franchises granted in 1920 for future operation are concerned. But both claim legal rights or at least equities, because of former certificates granted for operation over the same route, granted to them or transferred by other holders to them. Several certificates have already been granted by the Commission for operation over the whole or part of this proposed route.

One Elbert H. Wiley, in case No. 5621, obtained a certificate from the Commission for operation over this route on the 19th day of September, 1916. The certificate contained the words "and is not assignable without the consent of the Commission". It was also "granted subject to all the terms and conditions of the consent hereinabove mentioned," meaning the consent of the City of Watertown. The resolution of the city council limited the period of operation for two years from January 1, 1916. Later, and on August 21, 1918, Wiley was given a new permit from the city for the same route good until January 1, 1920. Wiley claims to have operated, with the exception of a short period, until December 30, 1919, when by assignment [Exhibit No. 6] he attempted to transfer to Albert J. House, the petitioner, his interest in the consent, a permit from the City of Watertown, and the certificate of convenience and necessity of the Commission. As his original consent from the city expired December 31, 1918, and as the certificate of the Commission granted September 19, 1916, was granted subject to all the terms and conditions of the consent of the city, and as this certificate was never renewed, it would seem that he was operating without a certificate from the Commission on December 30, 1919, and had no right or title to transfer. No application was ever made to transfer the certificate of the Commission to Arthur J. House, and even if such certificate did not expire with the time limit of the original consent from the City of Watertown, that is, on December 31, 1917, still Wiley could not have transferred any rights to House in December, 1919, without the consent of the Commission. It would therefore seem that any operation by Wiley during the years 1918 and 1919 was without certificate from this Commission and that he had no rights of operation to transfer to the petitioner.

Warner's claims rest on two contentions. In case No. 5959 Albert F. Warner received from the Commission a certificate of convenience and necessity on the 26th day of

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April, 1917, based upon a consent from the City of Watertown for the operation over the route in question, granted December 5, 1916, for a term of two years from January 1, 1916. The petitioner claimed no other bus line ran at that time over this route. This certificate was never renewed until the application of Warner in the Spring of 1920 on which he has already received a certificate in case No. 7646. It would seem, therefore, that whatever rights Warner had under this consent expired December 31, 1917. Warner also claims rights under the Wiley consent, and certificate in case No. 5621 discussed above, by virtue of a transfer from Wiley to one George W. Ives about September, 1918, and under which a city license for 1918 for the operation of this line was issued to said Ives on September 2, 1918, and later sold by Ives to Warner, as evidence of which a check [Exhibit No. 11] from Warner to Ives dated May 2, 1919, for \$25 was introduced. Ives claimed that he bought from Wiley whatever rights he had to the line, and understood he was selling them to Warner. But whatever was sold was at most a transfer of the consent from the City of Watertown for operation to and including December 31, 1919, and did not affect the certificate of the Commission, for no transfer was ever applied for from Wiley to Ives or from Ives to Warner.

It must, therefore, be held that the certificate granted to Mr. Wiley in case No. 5621 expired in accordance with its terms on December 31, 1917, and Mr. Warner's certificate in case No. 5959 expired December 31, 1917. Neither has been legally transferred or renewed, and this applicant stands before the Commission on exactly the same conditions as stood Mr. Warner whose certificate was granted August 24, 1920.

Certificates granted by the Commission in these matters have never contained a clause limiting operation under the certificate to the time set forth in the consents of the local authorities, and the petitioner should not be penalized for

not applying for a renewal of the Wiley certificate in 1918 or 1919, but it must be held that the Commission could, and now can, limit the time for which such certificates are issued to coördinate with the termination of local consents. This is a regulatory statute, and any necessary regulation to make it effective may be imposed by the Commission. The Commission has in previous cases regulated the timetables of competing routes, the number of lines allowed over a certain route, and other items of operation. The certificate of the Commission is dependent upon and can only issue after the consent for the operation is granted by the local authorities. These prescribe the streets over which the route may run in the city, village, or town, and if not containing a time limit are revocable at any time by the local authorities. When by operation of time or revocation by special act the local permit fails, the certificate of convenience and necessity does not authorize or allow operation over that particular portion of the route. If the certificate does not become void upon the happening of such an event it is suspended, and upon the holder at some future time, it may be a period of years, again obtaining the necessary local consent he proceeds without notice of any kind to the Commission again to operate the route, and with what result? The necessity for the operation over a certain route might be clear in the year 1920, but conditions might so change by the year 1925 that the operation would not be necessary or convenient but might be even detrimental to the public. If, therefore, it is to be construed that no time limit exists as to the certificate issued by the Commission and that it can not be revoked, a condition might grow up throughout the State by which the highways would be cumbered by vehicles operating under consents of the Commission and under conditions which would lead the Commission to revoke its certificates had it the power.

As an example, a case now before the Commission [case No. 7858] might be cited. In this case it is shown

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that five certificates have been issued for operation between the city of Kingston and the village of Saugerties, a distance of about twelve miles, over what is known as the Kings Road. At the present time but two lines are operating; the other three are dormant. Two lines appear sufficient to accommodate the public demand. Suppose at the end of five years one or all of the holders of dormant certificates succeed in obtaining the necessary local consents. With that number in operation none of them could operate at a profit and the Commission would be helpless to protect the public in the good and sufficient service it had been receiving or to protect the holders of certificates who had continued operating. This condition would work greatly to the detriment of the public.

Section 26 of the Transportation Corporations Law clearly bases the certificate issued by the Commission upon the consent of the municipal authorities. The Commission can only act after such consent has been obtained. Where the consent of the city or village named certain streets the Commission has no power to allow the operation over other streets, nor would it seem that the Commission had the right to grant a certificate for an operation over the streets for a time longer than that allowed by the city. If it should be held that the certificate of the Commission is unlimited in time and irrevocable, the condition would soon exist on many routes in the State where rights have been granted and operation has ceased but which are liable to be revived again under conditions far different than those which existed when the Commission granted the original certificate. No harm can be done by thus limiting the provisions of the certificate issued by the Commission, for all of these consents from the municipalities contain provisions allowing their revocation by the local authorities either at will or for certain reasons, and the large majority of them contain a definite time when the certificate itself expires without action by the local authorities. It would seem, therefore, clearly in the interests of the

public for the Commission to adopt the policy above outlined and limit the term of the certificates granted by it.

Now let us turn to the question as to whether two lines of auto buses between Watertown, Adams, and Pulaski are necessary. The route is through a populous and thickly settled country. The passenger train service of the Ontario division of the New York Central, the only railroad serving these points, is not frequent. The railroad itself does not object to the granting of either the Warner or House petitions. Adams had a population in 1915 of 1571, and from it radiate roads leading to several prosperous hamlets. Pulaski had a population in 1915 of 1860. Both of these places have increased since that time. From 1916 to date there have always been two, and sometimes three, auto bus lines operating along this route. (See application of Clarence M. Knight in case No. 7090.)

Both the City of Watertown and the Village of Adams must by granting their consents to such operations be favorable to granting the certificates. Indeed the attorney for the Village of Adams appeared formally to request the Commission to grant the application in this case. Evidence was introduced showing that the operation of two bus lines is profitable. Much evidence was introduced and more was offered to show that neither this applicant nor Albert F. Warner were proper persons to conduct an auto bus line. The case was bitterly fought, and it is apparent that an irritating condition exists.

Neither House nor Warner is operating upon a regular schedule at the present time. Both seem intent upon destroying the business of the other. In the meantime the public suffers. The Commission must undertake to arrange a fair schedule for both these lines, and upon the granting of this certificate to the applicant both he and Warner should be requested to submit for approval a proposed schedule. The Commission should by order fix the schedule for each. Public convenience and necessity are served by the main-

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tenance of regular schedules of operation, and if these are not maintained the certificate granted to this applicant and to Albert F. Warner should be revoked. The same reasoning applies to rates of fare which should also be fixed or approved by the Commission.

The Commission can not attempt at the present time to go so far into the detail and regulation of the operation of auto bus routes as it does into those of steam and electric railroads, but the lines are "common carriers" as defined by the Public Service Commissions Law [section 25, Transportation Corporations Law], and section 49 of the Public Service Commissions Law covers regulation of timetables. Other sections of the law give the Commission the right to fix a just and reasonable rate of fare.

Complaints as to the manners and lack of courtesy of employees might well be regulated by the local authorities who have sufficient power both under the terms of the consents and their general police powers to suppress disorderly conduct. If the parties in interest do not abide by reasonable regulations and provide competent and courteous employees, the local authorities should revoke their consents and so end the condition.

The Commission, after due and careful consideration of the evidence, determines that this applicant should receive the certificate requested, but that in addition to the usual restrictions and the prohibition against transfers without consent, clauses should be included providing for the submission and regulation of timetables and rates of fare, and for the termination of the certificate upon the expiration or withdrawal of local consents as above indicated.

An order will be entered accordingly.

All concur.

Amended and Supplemental Complaint under sections 71 and 72, Public Service Commissions Law, of ISAAC R. BREEN AS MAYOR OF WATERTOWN *against* NORTHERN NEW YORK UTILITIES, INC., as to rates for gas, and its heat units; and as to rates charged for electricity. [Case No. 6132.]

Valuation; Return; Accrued Amortization of Capital: Where a fund is accrued from annual charges to operating expense to cover theoretical depreciation of plant and equipment and other amortization of capital, the moneys in such fund not being set aside in a sinking fund but the moneys therein being put to use in the immediate corporate purposes of the corporation, the balance in such account will be deducted from the fixed capital in arriving at a determination of the amount upon which the return should be calculated.

Valuation: Where evidence of actual investment is clear and satisfactory, it will be adopted as a rate base, giving to evidence of reproduction cost only the weight of confirming the correctness of the clear evidence of actual cost.

Operating Expenses; Insurance on Lives of Officers: Premiums paid for insurance on lives of officers for the benefit of the corporation are not properly chargeable to operating expense as against the public, but should be charged to surplus instead.

Operating Expenses, General and Miscellaneous: While to a very large extent the policy of the utility as to whether or not salaries shall be liberal or otherwise and the proportion of the earnings which shall be devoted to various departments of the business must be left to the judgment of the directors of the corporation, which judgment may not be supplanted by that of the Commission, the Commission having found in this case that the commercial, general, and miscellaneous expenses of this company were excessive as compared with other like utilities in the same general territory, took such excess into account in determining the reasonable operating expenses.

Decided October 28, 1920.

Appearances:

Isaac R. Breen, Mayor, and Harold L. Hooker, City Attorney, for the City of Watertown.

Hughes, Rounds, Schurman & Dwight (by R. E. Dwight), 96 Broadway, New York city, and Delos M. Cosgrove, Watertown, for respondent.

HILL, Chairman:

The amended and supplemental complaint herein, bearing date October 15, 1918, alleges that the then effective rates charged by the respondent, both for gas and electricity, to consumers in the city of Watertown, are excessive, and that the quality and calorific value of the gas is below the requirements of the prescribed rules and regulations relative to the heating power standard for gas as approved by the Public Service Commission, Second District.

The gas rate schedule so complained of, which became effective January 31, 1918, runs as follows:

Lighting, Fuel and Power (regular meters) Service Classification No. 1.

For first	5,000 cubic feet per month,	\$1.75 per thousand.
For next	5,000 cubic feet per month,	1.70 per thousand.
For next	5,000 cubic feet per month,	1.65 per thousand.
For next	5,000 cubic feet per month,	1.60 per thousand.
For next	5,000 cubic feet per month,	1.50 per thousand.
For next	25,000 cubic feet per month,	1.40 per thousand.
For next	25,000 cubic feet per month,	1.30 per thousand.
All over	75,000 cubic feet per month,	1.20 per thousand.

No discount to be allowed on the above stated rates for prompt payment of bills.

In connection with the above a minimum charge of fifty (50) cents per month is to be made for "readiness to serve" when gas consumed in any month amounts to less than fifty (50) cents at the regular rate.

Subsequently, in May, 1920, the company filed a schedule which became effective June 15th increasing the price of gas to \$2.30 per M cubic feet for all consumers, and upon its petition bearing date May 1, 1920, this case, which had been submitted but not determined, was re-opened for the purpose of considering the reasonableness of such proposed increase, and further hearings were accordingly had.

The electric rates are still under consideration, and the order now to be entered will dispose only of the gas rates.

REQUIRED RETURN

In order to ascertain the required return it is necessary to consider, among other things, the capital actually expended and the amount necessarily invested by the company in the gas department in the way of working capital and materials and supplies required to be kept on hand in the prosecution of the business. A large volume of testimony was given upon this subject, including a computation by Haskins and Sells, expert accountants, based upon calculations made from

the books, records, and accounts of the company and its predecessors; an appraisal based on reproduction values as of the year 1914, made by Jones and Hazel, expert accountants, and also an appraisal and computation made by Roy Husselman.

Haskins and Sells, and Jones and Hazel were experts produced by the corporation, while Husselman was the expert produced by the City of Watertown.

Haskins and Sells' Valuation:

Mr. C. E. Scoville, the expert who made this calculation, deduced from the books of the company as presenting the amount of investment in the gas department at December 31, 1917, the sum of \$739,744.89. This included an item of unamortized debt discount and expense \$44,017.32, and suspense for renewals and replacements \$56,767.94. The Commission does not recognize either of these items as a proper element of invested capital. It needs no discussion to demonstrate that unamortized debt discount forms no part of invested capital; and it appears from the records of the Commission that the suspense account for renewals and replacements was merely a temporary account which the Commission directed to be set up to be amortized, not out of operating expenses but out of earnings (order February 29, 1912, case No. 2293).

These items should therefore be deducted; and there should also be deducted the proportion of the company's reserve for accrued amortization of capital applicable to the gas department, amounting to \$121,543.63. To bring the account down to December 31, 1919, certain net additions to fixed capital should be added. These additions are deduced from the annual reports for the years 1918 and 1919, totaling \$29,511.91. There should also be an allowance for working capital and supplies: this we have fixed at \$80,000. The ground upon which this sum has been determined, and the reasons for deducting the reserve, are separately stated farther on in the opinion.

Jones and Hazel:

The reproduction appraisal made by Jones and Hazel, based, as they represent, on 1914 prices, but made as of October 1, 1917, shows a valuation of \$1,238,454.81.

Adding to this the additions made since the date of the appraisal, and deducting the proportion of the accrued amortization of capital applicable to the gas department as above mentioned, would reach an investment as of December 31, 1919, of \$1,159,684.99; and when to this is added an allowance of \$80,000 for working capital we will have arrived at the investment as of December 31, 1919, according to this witness, of \$1,239,684.99.

Husselman:

The witness Husselman computed a rate base as of December 31, 1917, based on his personal appraisal of the gas property, and also based upon a computation showing investment, additions and withdrawals, depreciation and return on investment, covering the years 1911 to 1917 inclusive. In this computation the witness charged against the property each year a sum representing estimated actual depreciation. After adding to the average value of the depreciable property an amount to represent working capital, the witness allowed a return on the total capital at the rate of 6 per cent and accumulated the surplus or deficit of earnings on that basis to the capital account. Proceeding in this way the witness reached a rate base or sum upon which the return should be computed as of December 31, 1917, amounting to \$569,030.30, which included an allowance of \$32,152 for working capital. To this we have added \$29,511.91, representing net additions since the date named to and including December 31, 1919.

Inasmuch as the estimated actual depreciation was deducted in reaching this valuation, the account for the amortization of capital should not be deducted from the total, and if this method of computing fixed capital is to be used, we think an 8 per cent basis of earnings would be at least fully as fair as the 6 per cent which was adopted by the

witness. The substitution of 8 per cent for 6 per cent in this calculation would add to the valuation the sum of \$70,508.

The working capital allowed by the witness is much smaller than seems fair to the Commission. The treatment of working capital under a separate heading justifies the claim of the company, as testified to by its secretary, for \$80,000 to cover this item. Adjusting Husselman's figures to the modifications thus suggested we get a valuation as of December 31, 1919, of \$727,344.01, while by adhering to his 6 per cent basis of earnings we get as of December 31, 1919, \$656,836.01.

WORKING CAPITAL

The reported operating revenues of the gas department for the year ended December 31, 1919, amounted to \$246,787.20. As the customers have the use of the gas for one month before the bills are rendered, and as it usually requires another month before all the collections are received, it is believed that the company requires an amount equal to two months, or one-sixth, of its operating revenues to provide the necessary working capital. Upon that theory one-sixth of the reported operating revenues for the year 1919 would amount to \$41,131.20. As the proportion of the gas property to the entire property of the company, excluding general fixed capital, is reported to be 14.48 per cent, and as the reported amount of materials and supplies as of December 31, 1919, was \$317,181.82, by applying that ratio to the total of materials and supplies we have \$45,927.92, making a total on the above basis of \$87,059.12.

In the most recent capitalization case, the Commission's division of capitalization fixed upon \$80,000 to represent this item, which was accepted by the company, and we will adopt it for this case also.

TREATMENT OF THE "RESERVE FOR ACCRUED AMORTIZATION OF CAPITAL"

The respondent claims that this item should not be deducted from the fixed capital account in arriving at the investment

of the company in property devoted to the public service, and cites the decision of this Commission in *Fuhrmann v. Buffalo General Electric Co.*, III P. S. C. 2nd D. p. 656, in support of such claim. A careful reading of the elaborate treatment given the question by Chairman Stevens in that proceeding seems to disclose a clear distinction between the two cases. In the *Fuhrmann* case the amortization accruals were carried into a fund [see pp. 725-6] so arranged that the aggregate of such accruals should at the expiration of the company's franchise in 1932 equal the amount of the company's capital stock and outstanding debt at that time in excess of the then value of its tangible property. The theory of the fund was that at the expiration of the company's right to occupy the streets and perform its corporate functions therein the fund should enable the company to close its business without loss. The Commission held [pp. 725-6] that under these circumstances the accruals should be treated as being invested on the sinking fund theory.

In the instant case the amortization fund has not been created on the sinking fund theory, but the accruals have been charged to operating expenses and credited to an account known as "Accrued Amortization of Capital" prescribed by the Commission in substantially the following terms:

Credit to this account such amounts as are charged from time to time to operating expenses or other accounts to cover depreciation of plant and equipment and other amortization of capital. When any capital is retired from service the original money cost thereof . . . less salvage shall . . . be charged to this account. The amount originally entered or contained in the charges to any capital account in respect of such capital so going out of service shall be credited to such capital account. . . .

The fund so created is in the nature of a trust fund which is provided for renewals and replacements of fixed capital and drawn on for those purposes as the actual renewals and replacements become necessary. The accruals are made on the basis of the theoretical depreciation, while the disbursements are or should be made to meet the actual replacement costs as and when the depreciation becomes realized. The

fund is contributed by the public in the rates for that purpose. The theory is that eventually it will exactly equal the depreciation and obsolescence in the depreciable property. The accruals to the fund necessarily precede the actual replacements, however, and as a result there is found to exist a running balance in this account representing money which has been contributed by the public in the way of rates. In practice this balance is "borrowed" from the fund and devoted to immediate corporate purposes such as working capital and the acquisition of new property. The reserve account thus becomes a mere accounting figure. The fund itself is put to use and becomes for practical purposes the equivalent of active capital which otherwise must needs be raised by note or security issues and upon which a return is allowed. Sinking funds can not properly be thus mingled with the general funds of the company, but the money itself must be set apart or invested and the accrued interest or earnings of the fund, being necessary to round out the amount required at the end of the period, can not be charged against the corporation as a part of its corporate income. It is upon these considerations that the Commission has adopted the rule of deducting the amount of the balance in the amortization or depreciation account from the fixed capital in arriving at a basis for the fixing of rates, where the facts are as found in this case.

INVESTMENT AS SHOWN BY THE COMPANY'S BOOKS

This case is peculiar in that in the year 1908, in a capitalization proceeding, the valuation of the company's gas plant was in a contested case determined by the Appellate Division of the Third Department to be the sum of \$610,000. (*Matter of Application of Watertown Gas Light Company*, 127 A. D. 462.) We thus have as a starting point for the ascertainment of the investment in the gas department of this company a judicial decision of comparatively recent date. While this determination was made in a capitalization proceeding, it was based by the court solely upon a finding of the actual cost of the property. Both the Commission and

the City of Watertown were parties to that proceeding, and it would seem that the decision is *res judicata* and binding upon the parties thereto as to the actual cost at that time. It should be explained that the Watertown Gas Light Company, which was a party to that proceeding, is the predecessor of the respondent, Northern New York Utilities, Inc.

The Commission in its treatment of the books and accounts of the company ever since that time has built upon that foundation, so that assuming the books to have been correctly kept in the interim the books themselves would seem to form the best basis for a determination of the amount upon which the return should be computed in this case.

The accounts of the company have been the subject of frequent adjustment and correction by the Commission since the date referred to, and all of such corrections and adjustments which have been made from time to time have been accepted by the company and been incorporated into the accounts themselves. All fixed capital accretions have been arrived at as to amount in compliance with the Commission's Uniform System of Accounts, under which all costs of materials and labor are required to be entered at actual figures.

According to the books and accounts of the company so referred to, the fixed capital as of December 31, 1919, was \$692,465.27

This did not include, however, an item of general fixed capital, being 14.48 per cent of the general fixed capital of the company, amounting to 16,693.17

This gives a total of \$709,158.44

Deducting therefrom the reserve for accrued amortization of capital 121,543.63

leaves the fixed capital applicable to gas department at December 31, 1919 \$587,614.81

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Adding to this sum the allowance for working capital at which the Commission has arrived, namely \$80,000.00

gives an amount upon which to compute a return as of December 31, 1919..... \$667,614.81

The five computations are, therefore, as follows:

1

Haskins and Sells

Respondent's Exhibit No. 3

Capital invested Dec. 31, 1917.....		\$733,744.89
<i>Adjustment by Commission:</i>		
<i>Less</i>		
Unamortized debt discount and expense.....	\$44,017.32	
Suspense for renewals and replacements.....	56,767.94	
		100,785.26
		<u>\$633,959.63</u>
Additions 1918.....		10,095.02
Additions 1919.....		19,416.39
(From Company's Annual Reports to P. S. C.)		
Amount added for general fixed capital for years 1918, 1919.....		10,446.10
		<u>\$673,917.64</u>
<i>Less</i>		
Reserve for accrued amortization of capital.....		121,543.63
		<u>\$557,374.01</u>
Depreciated value at Dec. 31, 1919.....		80,000.00
Allowance for working capital.....		
Amount upon which to compute return.....		<u>\$637,374.01</u>

2

Jones and Hazel

Reproduced value as of Oct. 1, 1917, based on 1914 prices.....	\$1,235,454.81	
(See p. 33, respondent's last brief)		
<i>Adjustment by Commission:</i>		
Additions 1917 (Oct. 1-Dec. 31) estimated.....		2,815.80
Additions 1918.....		10,095.02
Additions 1919.....		19,416.80
Amount added for general fixed capital for years 1918-1919.....		10,446.10
		<u>\$1,291,228.62</u>
<i>Less</i>		
Reserve for accrued amortisation of capital.....		121,543.63
		<u>\$1,159,684.99</u>
Allowance for working capital.....		80,000.00
Amount upon which to compute return.....		<u>\$1,239,684.99</u>

3

Roy Huselman, 1.

Exhibit No. 6

Rate base Dec. 31, 1917.....		\$569,030.00
<i>Adjustment by Commission:</i>		
Additions 1918.....	\$10,095.02	
Additions 1919.....	19,416.89	
		29,511.91
Amount added for general fixed capital for years 1918, 1919.....		10,446.10
Additional allowance for working capital.....		47,848.00
Amount upon which to compute return.....		<u>\$656,836.01</u>

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4

Roy Husselman, Jr.

Exhibit No. 6

Rate base Dec. 31, 1917.....		\$569,030.00
<i>Adjustment by Commission:</i>		
Computing the assumed rate of return at 8% instead of 6% increases the amount of return by.....		70,508.00
Additions 1918.....	\$10,095.02	
Additions 1919.....	19,416.89	
		<hr/>
Amount added for general fixed capital for years 1918, 1919.....		29,511.91
Additional allowance for working capital:		10,446.10
Commission.....	\$80,000.00	
Husselman.....	32,152.00	
		<hr/>
		47,848.00
Amount upon which to compute return.....		<hr/>
		\$727,844.01

5

From Books

Fixed capital Dec. 31, 1919.....		\$692,465.27
General capital:		
Organisation.....	\$92,738.59	
Less purely electric.....	47,887.96	
		<hr/>
		\$44,845.63
General equipment.....	70,438.69	
		<hr/>
		\$115,284.32
Gas proportion based on ratio that total of gas fixed capital bears to total of all fixed capital, less general fixed capital:		
\$692,465.27		
—14.48%		
\$4,779,469.12		
Amount added for general fixed capital from organisation of company to Dec. 31, 1919, based on 14.48% of \$115,284.32.....		16,693.17
		<hr/>
		\$709,158.44
Less		
Reserve for accrued amortisation of capital.....		121,543.63
		<hr/>
Fixed capital, less depreciation applicable to gas department at Dec. 31, 1919.....		\$587,614.81
Allowance for working capital.....		80,000.00
		<hr/>
Amount upon which to compute return.....		\$667,614.81

It will be seen that the rate base derived from the books and accounts of the company is very slightly in excess of Husselman's figure on his 6 per cent basis of return when corrected with the allowance of \$80,000 for working capital instead of the \$32,152 which he allowed, and considerably lower than his estimate when adjusted to an 8 per cent return. It is also somewhat in excess of the Haskins and Sells' computation, although far below the result reached on the basis of Jones and Hazel's appraisal. This large variation may be readily explained by the fact that Jones and Hazel adopted 1914 prices for property which was bought many years prior to that date.

Under the circumstances it seems clearly proper to adopt the investment as shown by the books and accounts of the company. This amounts to \$667,614.81 as of December 31, 1919. We have no evidence showing the accretions to fixed capital since that date. It would seem proper to adopt a figure which would represent the average investment for the year 1920, and assuming the additions for the year 1920 to correspond with those of 1919 (\$19,416.89), and accepting half of that amount for the average, would give us approximately \$10,000, and a total of \$677,614.81. This sum we adopt as actual investment to a reasonable return upon which the company is entitled.

This determination involves the rejection of reproduction figures as presented by Jones and Hazel in favor of actual historical investment based upon cost as the controlling figures. Jones and Hazel's figures are what would naturally be expected by way of contrast between actual investment and reproduction cost. It appears also in the record that if reproduction figures of the present date were to be adopted they would be at least 50 per cent higher. This Commission has frequently discussed the weight which evidence of reproduction value should justly be given in rate cases. We will not discuss the question here. In this case where the evidence of actual cost or investment is clear and satisfactory we will adopt it, giving to the evidence of reproduction cost only the weight of confirming the correctness of the clear evidence of actual cost.

CRITICISM OF OPERATING EXPENSES

Insurance on Lives of Officers for Benefit of Corporation:

Counsel for the city criticise a charge to operating expenses allocated to the gas department at \$3719.96, which represents a portion of the cost of insuring for the benefit of the corporation the lives of the president and general manager of the company. Objection is made that this is not a necessary or proper element in the expenses of opera-

tion. It is not merely a question of the wisdom of the policy adopted by the board of directors. No doubt from the point of view of the stockholders this might be a prudent and farsighted measure. It does not follow, however, that for the purpose of ascertaining expenses of operation and thus arriving at the return on its capital which the company is receiving or entitled to receive from the public, such a charge should be included. Ordinary fire losses constitute an ascertainable loss of capital to replace which the insurance money would be at once definitely devoted. The loss attributable to the death of an officer could not be thus definitely measured, and it is by no means certain that the insurance money would be needed or used to offset such loss. In no event would the money realized from such a source find its way into the operating revenues. It would naturally have the effect of increasing the surplus and become available for an extra dividend. As concerns the public, it would seem enough to say that if through the loss of an exceptionally able officer fixed charges and operating costs increase it will be the duty of a regulating commission to allow rate increases to meet the legitimate needs of the corporation as they arise. For these reasons we think the item of life insurance can not properly be included in expenses of operation, but should be charged to surplus instead.

Commercial, Miscellaneous, and General Expenses:

Another item which has been sharply criticised on the ground that it is excessive is the total of the commercial, general, and miscellaneous expense, amounting for the year 1919 to \$59,763.91, or \$0.4826 per M cubic feet sold. The challenge of the reasonableness of this figure was based upon a comparison with the corresponding figure appearing in the operating expenses of several other manufactured gas companies in the State of New York. The relative figures in the companies so compared are much lower, ranging from \$0.3097 down to \$0.1503.

The salary of the president was \$12,000 up to the year

1919, when it was increased to \$18,000; that of the general manager is \$10,000; and the smaller salaries also seem liberal. At the same time it would appear that the list as a whole is consistent in itself; there are no officers paid for the performance of nominal duties, and it does not appear that any salaries are paid as a cover or medium for the diversion of earnings from the stockholders. An analysis of the other items shows many of them to be several hundred per cent higher than in any of the other companies selected for comparison, and as a total the comparison is as follows:

COMMERCIAL, GENERAL, AND MISCELLANEOUS EXPENSES, TEN
COMPANIES COMPARED, 1919

(Excluding Amortisation and Cost of Manufacturing Residuals)

	Gas sold M cu. ft.	Total Com., Gen. & Mis. Ex.	Per M cu. ft. sold
Northern New York Utilities Inc.	123,843	\$59,763.91	\$0.4826
Adirondack Electric Power Corp.	73,113	22,644.69	0.3097
Public Service Corp.	101,156	22,106.04	0.2185
Chactanunda Gas Lt. Co.	102,265	27,859.25	0.2724
Lockport L., H. and P. Co.	115,020	17,291.94	0.1503
Kingston G. and E. Co.	118,259	26,606.02	0.2260
Rome G., E. L. and P. Co.	119,032	31,634.22	0.2654
Long Island Ltg. Co.	132,764	27,865.33	0.2091
N. Y. State G. and E. Corp.	150,810	36,929.52	0.2449
Fulton County G. and E. Co.	170,783	32,060.20	0.1873

The Commission realizes that to a very large extent the policy of the utility as to whether or not salaries shall be liberal or otherwise, and the proportion of the earnings which shall be devoted to various departments of the business, must be left to the judgment of the directors of the company, and that such judgment may not be supplanted by that of the Commission. But unless there is some limit to the application of this doctrine, and it is to be held that the Commission can not criticise expenditure on the ground that it is excessive, the power to regulate rates is greatly circumscribed. A recent determination of this Commission was reversed by the Appellate Division on the ground that it acted upon a comparison as between two corporations of the cost of production and distribution of gas without evidence that the conditions of manufacture and distribution were alike.

In this case, however, the city points out that its comparison is confined to commercial, general, and miscellaneous expenses, which in their nature relate for the most part to management and are not dependent to any considerable degree on material costs. It has made the comparison between the Northern New York Utilities and all of the other New York companies of comparable size, some being larger and others smaller. If the differences shown were moderate they could well be disregarded, but they are so striking and pronounced that I think they call for explanation on the part of the company. No explanation has been forthcoming. It will be noted that the total was \$0.4826 per M cubic feet in the case of this company, compared with \$0.3097 in the case of the next highest, and ranging thence down to \$0.1503. Realizing fully the range of policy which must be conceded to the management of the corporation, it is obvious that there is no great room for variance in these classes of costs between companies of comparable size in the same general territory. These expenditures do not vary with climatic conditions, freight rates, or material costs, and in the State of New York, outside the larger cities, they should be found to be substantially similar. Under the circumstances it would seem entirely just to say that upon this showing the costs in the departments mentioned are excessive and unreasonable to the extent at least of 15 cents per M cubic feet of gas sold.

Making a constructive income account in the light of present results, adjusted by deducting from the operating expenses, as proved by the respondent, the cost of life insurance, and the equivalent of 15 cents per M cubic feet of gas distributed, and with revenues based on the \$2.30 rate now in effect, we get the following. Both parties seem willing to assume that the gas sold will remain the same as in 1919, which was slightly in excess of the delivery for the previous year, and we therefore accept that basis.

CONSTRUCTIVE INCOME ACCOUNT

With adjustments as above

Revenue:		
Sales same as 1919, 123,843,300 cu. ft. at \$2.30 per M.		\$281,839.50
Company's estimate of operating expenses	\$254,920.62	
Taxes	10,377.58	
Uncollectible bills	1,083.12	
Increased costs due to 40% increase in freight rates at .0016 per M.	11,344.09	
	<u>\$277,725.41</u>	
Credit miscellaneous revenue	40,313.02	
	<u>\$237,412.39</u>	
Deduct life insurance	\$3,719.96	
Excessive charge for Com., Gen. and Mis. Exp.	18,576.49	
	<u>22,296.45</u>	
Corrected operating expenses		215,115.94
Gross income		<u>\$69,723.65</u>

AMOUNT AND RATE OF RETURN

By adjusting the apparent gross income thus deducted to the base rate which has been adopted, we find \$69,724 ÷ \$677,614 yields 10.28 per cent. Before determining a just and reasonable rate we should take a glance at the return which the company has received in recent years, which computed upon book value as adjusted from year to year and uncorrected operating expenses as shown by the books, have been as follows:

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	1915	1916	1917	
<i>Gas Operations</i>				
Operating revenues.....	\$109,774.68	\$123,268.79	\$137,218.61	\$167,854.31
Operating expenses.....	6,233.68	7,363.73	8,546.12	
Taxes.....	608.24	693.51	782.05	
Uncollectible bills.....		116,641.60	131,426.03	146,844.78
Income from gas operations.....		\$34,779.06	\$30,211.21	\$21,009.53
Amount upon which return should be computed, according to company's books.....		\$590,436.40	\$620,115.22	\$633,851.53
Rate of return.....		5.89%	4.87%	3.31%
<i>Gas Operations</i>				
Operating revenues.....		\$195,818.38	\$211,618.58	\$246,787.20
Operating expenses.....		8,043.82	9,674.93	
Taxes.....		1,032.54	1,055.32	
Uncollectible bills.....			204,915.74	222,348.85
Income from gas operations.....		\$13,502.73	\$24,438.37	\$24,438.37
Amount upon which return should be computed, according to company's books.....		\$644,230.36	\$667,614.81	\$667,614.81
Rate of return.....		2.06%		3.66%

Allowing for any probable excess in the book operating costs for these years it is still apparent that the rate of return has been far below a reasonable or compensatory level except in the year 1915. It is quite possible that during these years the electric department has been carrying the gas department and that the company should have taken earlier steps to readjust the gas rates.

Of late years the Commission has in a general way treated 8 per cent as a standard of reasonable return upon capital. In some cases this has been exceeded, and a majority of the Commission has recently indicated a tendency to consider this standard somewhat illiberal.

In this case the tariff which is under consideration is comparatively high and there is no evidence of effort on the part of the utility to minimize operating expenses in any department.

In view of these facts, I think the 8 per cent standard should be adhered to. In order to secure such a rate the company will need a gross revenue equal to 8 per cent on \$677,614, or \$54,208. The present rate yields on the basis of the corrected income adopted as above, \$69,724. The difference is \$15,516, which is the equivalent of 12.53 cents per M cubic feet of the accepted volume of sales. A net price of \$2.17 is the nearest even figure to constitute a maximum rate which will meet the views above expressed. The company has already had several months' revenue at the \$2.30 rate, but prior to the inauguration of that rate the acutely enhanced cost of materials had set in so that it is fair to assume that the proceeds for the limited period in excess of \$2.17 were substantially absorbed by such enhanced costs prior to the inauguration of the \$2.30 rate.

Calculations based on the experience of the Commission in other cases indicate that with so high a charge per thousand the additional revenue derived from the proposed minimum charge of fifty cents per month will be negligible and would make no appreciable change in the rate above deduced.

An order should be entered disapproving the present tariff and permitting the company to put into effect on one day's notice a tariff similar in terms, with a maximum rate of \$2.17 per thousand cubic feet.

Commissioners Irvine, Barhite, and Kellogg concur ; Commissioner Van Namee not present.

In the Matter of Investigation of the ROCHESTER AND SYRACUSE RAILROAD COMPANY, INC., charges for the transportation of newspapers; suspension order. [Case No. 7735.]

Decided October 28, 1920.

Appearances:

Clarence E. Shuster, Esq., attorney for the Rochester Times Union, Rochester Democrat and Chronicle, and Rochester Herald.

Paul Folger, Esq., for the Rochester and Syracuse Railroad Company, Inc.

BARHITE, Commissioner:

This is a complaint by newspapers published in the cities of Rochester and Syracuse against the proposed increase in the rate for carrying newspapers on its cars. The rate now in force is 25 cents per hundred pounds, with a minimum charge of \$2 per month. It is proposed to increase the rate to 50 cents per hundred weight with the same minimum charge. The papers are done up in bundles and addressed at the office of the newspapers, taken to the car, and loaded by the representative of the newspaper in the vestibule reserved for the motorman. The bundles are thrown off at the various stations or handed to the consignees named on the packages. While packages sometimes go astray the loss is sustained by the publisher. The number of pounds shipped by the various papers varies, but it appears that about 20,000 pounds per month are sent over this road by one publication; another ships 30,000 pounds per month, and another 7500 pounds per month. According to estimates placed before the Commission, the average weight per day shipped by one paper approximates one thousand pounds, and the average distance carried is 24 miles. This is a rate of \$5 a ton for the distance named, and no labor is performed by the railroad except to hand out a package when its

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destination is reached. All other trolley roads extending from Rochester with one exception charge 25 cents per hundred weight: that one exception has a rate of 30 cents per hundred weight; all steam roads with the exception of one short line have a rate of 25 cents per hundred weight, and in the case of the steam roads the papers are delivered not upon the car but at the station, and the road places them upon the car. The increase proposed by the Rochester and Syracuse Railroad Company, Inc., is 100 per cent, and no explanation or evidence has been offered to justify this increase, and until evidence is offered which will justify an increase it should not be allowed.

Chairman Hill and Commissioners Irvine and Kellogg concur; Commissioner Van Namee not present.

Petition of ST. LAWRENCE TRANSMISSION COMPANY under section 68, Public Service Commissions Law, for permission to construct an electric plant (extension) in the town of Fowler, St. Lawrence county. [Case No. 7545.]

Extension of Electric Plant: The Commission has power, even though another company has obtained a franchise and is operating in a town, to grant an application for the construction and operation of a plant by another company, but it must be shown that such construction and operation are necessary or convenient for the public service.

If a company has served only a portion of the territory claimed by it and has not to date developed the remaining portion and can not do so in a reasonable time or sell such power at a reasonable rate, the public interest demands that another company able and willing to supply such service at reasonable rates be allowed to do so.

Decided October 28, 1920.

Hearings at Albany June 9, July 14, 30, August 25, 1920.

Appearances:

Neile F. Towner, Albany, as attorney for petitioner.

Purcell, Cullen & Pitcher (by Francis E. Cullen), Watertown, as attorneys for Oswegatchie Light and Power Company.

Paul B. Murphy, Potsdam, Secretary and Treasurer, for St. Lawrence Transmission Company.

VAN NAMEE, Commissioner:

The St. Lawrence Transmission Company is an electrical corporation which generates, transmits, and sells electric energy for light, heat, and power in the northern counties of the State and particularly in St. Lawrence county, where its lines already extend through the towns of DeKalb, Hermon, and Gouverneur, among others.

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On April 22, 1920, it obtained a general franchise from the Town Board of the Town of Fowler to furnish electric energy in the town. It proposes to extend a line from its main transmission line at Scotch Settlement near Richville in the town of Gouverneur southeasterly to the incorporated villages of Emeryville and Fowler in the eastern part of the town of Fowler, and it has already secured rights of way from property owners along the proposed line which from Emeryville to the main line is $4\frac{3}{4}$ miles long, and from Fowler $11\frac{1}{4}$ miles farther.

This application is for permission to construct such line and operate such franchise. It is opposed by the Oswegatchie Light and Power Company upon the ground that the Oswegatchie company has occupied since 1894 as its natural territory the field sought to be entered, and is ready and willing adequately and sufficiently to supply all demands for electric energy within the territory, and that the granting of the petition would be an invasion of its rights, violation of the law, and contrary to the policy of the Commission. It is conceded that the applicant has a sufficient supply of power to satisfy any demand made upon it by the inhabitants or industries of the town of Fowler. The extension is to be financed from its current funds, and will cost not to exceed \$10,000.

While the petitioner is prepared to supply light, heat, and power to such customers as it may obtain along the proposed transmission line its primary purpose in such extension is to supply the W. H. Loomis Talc Corporation of Emeryville with electric energy amounting to approximately 230 hp. not later than January 1, 1921, under a contract already made subject to the granting of this application.

The Loomis Talc Corporation is now constructing its mill at Emeryville, and if successful in its operations may require as high as 1000 hp. within the next year.

The Commission has power, even though another company has obtained a franchise and is operating in the town, to grant this application, but it must be shown that such operation is necessary or convenient for the public service. [Section 68, Public Service Commissions Law.]

The Oswegatchie company has never received a certificate from this Commission for operation in the town of Fowler. Its claim is based on transfers from the International Telephone and Telegraph Company of a franchise granted about 1893 by the town to operate telegraph lines, and subsequently a permit to the Oswegatchie company to operate the highways of the town from A. Johnson, the then highway commissioner, now dead. This permit was not produced and only secondary evidence was offered as to its existence. No evidence was produced to show the permit extended to furnishing light to Hailsboro where the main plant of the Oswegatchie company is situated, nor in reference to conducting electric energy. Wires were actually strung, however, but in no portion of the town except the village of Hailsboro and from there to Gouverneur in the adjoining town.

A franchise was granted by the town to the Oswegatchie company on September 8, 1915, but the company never applied to the Commission for a permit for operation. The rights of the protestant rest upon occupancy rather than upon franchises. The transfer of the original franchise from the telegraph company is shown by secondary evidence, and whatever rights were acquired by the franchise granted in 1915 have never been recognized by the Commission. If the company has served only a portion of the territory claimed by it, and has not to date developed the remaining portion, and can not do so in a reasonable time or sell such power at a reasonable rate, the public interest demands that another company be allowed to do so.

The existence of the plant of the Oswegatchie company

and its franchises or rights by reason of occupancy, where it is shown it is unable or unwilling to render adequate service, is not in itself sufficient reason for denying the approval of the exercise of a franchise granted to another company. (*Persbacher et al. v. Callicoon Ind. El. Co.*, VIII P. S. C. 2nd D. 90.)

There is nothing in this case to show that the granting of the petition will seriously affect the business of the Oswegatchie company except to the extent that it will deprive it of this much additional business. It does not in any way interfere with the present business of that company. It is but the development of a field never occupied by it. Whether the Oswegatchie company is operating in the town of Fowler under a franchise or actually occupying the territory without violating any provision of the Public Service Commissions Law need not be decided in this case. That question would be properly before the Commission in an action brought under section 74 and not under section 68 under which this proceeding is brought.

Evidence was introduced to show that for many years prior to the establishment of the Commission the Oswegatchie company has occupied, developed, and sold current generated by water power at Hailsboro. It has now before the Commission an application similar to this proceeding under a franchise granted by the town on September 8, 1915. It is clear that whatever were its rights over the whole town it has never exercised them, nor developed any power except in the northwestern portion of the town in the vicinity of Hailsboro. The Oswegatchie company serves the village of Hailsboro, the town of Gouverneur, the town of Rossie, a lighting company in the town of Antwerp, Jefferson county, and forty consumers in the vicinity of Hailsboro. It has no lines within four miles of that part of the town of Fowler which the applicant wishes to serve.

If the Oswegatchie company were occupying the whole of

the territory as was the objecting company in the *Matter of Oswego River Transmission Company*, 3 P. S. C., Second District, page 269; in the *Matter of the Red Hook Light and Power Company*, 3 P. S. C., Second District, page 475; or in the *Matter of Northern Power Company*, 3 P. S. C., Second District, page 817, the principles laid down in these cases would apply, but the Oswegatchie company has not extended its operations for twenty-five years from the vicinity of Hailsboro. But it claims it has not extended its lines or developed other water power in the town because of the absence of demand for such power. It claims that it is able to do so and supply the power needed by the Loomis Talc Company in the quantity desired and as continuously as the applicant, and being first in the territory is justly entitled to the business.

The Oswegatchie Light and Power Company is owned by the International Pulp Company which has its plant within half a mile from Hailsboro and the power station of the Power company. It manufactures talc. The president and the secretary of both companies are the same. It does not even own any of its water power sites, but leases them from the International Pulp Company. At present it claims to have available, either developed or ready for development, five sites known as No. 4, No. 5, and No. 7, all at or near Hailsboro, the Hyatt site and the McAllister power site. Sites 4, 5, and 7 are under lease, but the others are now owned by the Pulp company and there is no contract or written agreement to transfer them to the Power company, but it may be assumed, on account of the community of interests, that such transfer or some agreement or lease would be made. The Hyatt power site largely is undeveloped at the present time. It is on the site of a mill which was burned down some years ago. There is no machinery or building; there is a crib dirt dam and a wooden flume both in a bad state of repair. Water-wheels and electrical

generator will have to be installed and general repair to flume and dam made before electricity can be generated there [page 92 minutes]. To develop 1025 hp. would cost approximately \$125,000 [page 113 minutes]. The McAllister site is entirely undeveloped. It has possibilities of considerable power, but it would mean the expenditure of large sums of money and at least eighteen months to bring it to a condition where it would be available.

As the Loomis company requires for its operation a continuous supply of power, Summer as well as Winter, it can only be sure at the present time from the Oswegatchie company of the difference between the present demands for first class power on the company and the limit of its capacity of supply at the period of minimum flow of water. That is the measure which, if the Oswegatchie company were given the contract, it could at once and always supply the Loomis company. Taking the Loomis company together with the demands which might be expected of private individuals for lighting purposes in the surrounding community, it is evident that at least 300 hp. should be available by whichever company extends its lines to this portion of the town.

An examination of the water power, developed and undeveloped, leased or controlled by the Oswegatchie company, was made by experts of the Commission, and submitted to the parties in interest. No exception was taken to figures or conclusion. It is part of the record and reference to it is made for the figures here set forth.

The three generating plants of the company have at present a total installed capacity of 1030 kw. These plants have virtually no local storage, and are dependent entirely upon the stream flow. This flow is affected materially by plants farther up the river which have large ponds, and may shut down and store water over Sundays and holidays. That No. 4 plant receives 75 per cent of the stream flow,

No. 5 $37\frac{1}{2}$ per cent, No. 7 100 per cent, and the Hyatt site 100 per cent, appear reasonable. The assumed overall efficiencies of 70 per cent for No. 4 plant, 50 per cent for No. 5 and No. 7, and 75 per cent for the Hyatt site are about as much as can be expected from the plants in question. The following table sets forth the data:

<i>Plant</i>	<i>Feet head</i>	<i>Min. average monthly c. f. s.</i>	<i>Efficiency</i>	<i>Continuous avail. hp.</i>	<i>Continuous avail. kw.</i>
No. 4.....	25	270	70	538	400
No. 5.....	14	135	50	107	80
*No. 7.....	21	300	50	430	320
Total developed plants.....				1,073	800
Hyatt	24	360	75	736	550
Total including Hyatt (undeveloped).....				1,809	1,350

*Includes additional 6 feet of head now under litigation.

For a minimum average monthly flow of 462 c. f. s. (1918), the continuous available hp. would be $\frac{462}{360} \times 800 = 1025$.

Recording charts of the maximum load were submitted for the 1st day of September. Due to insufficient notations it is impossible to combine them accurately, but apparently it was about 750 kw., or 1000 hp.

The 1919 annual report of the company reports maximum loads as follows: January 720, February 800, March 670, April 700, May 630, June 620, July 640, August 720, September 780, October 840, November 840, December 820.

Even assuming no increase over the 1919 load, there would appear to be very little, if any, continuous surplus power available from the existing plants No. 4, No. 5, and No. 7 during the period of the probable minimum average monthly flow of the river. It may be, however, that a portion of the maximum load may represent second class power delivered to the International Pulp Company, which power would be made available if a demand for first class or continuous power existed.

The evidence given by the Oswegatchie company as to its demand varied between 800 and 900 hp. [pages 86 to 88] to 1500 hp. [page 42]. It is quite evident, however, that the company in its present condition had a demand for practically all of the first class power it can use, and if it has any second class, or dump, power which it is now selling to its parent company, the International Pulp Company, it will have to cease giving to it any power if it is to supply any first class power to the Loomis company.

This brings us to another consideration in this case. If the Oswegatchie company were entirely independent of the International Pulp Company and had ample power to serve the present and future needs of the Loomis company there would be no question as to the denial of the application, but the fact that the Power company is owned and controlled by the International Pulp Company which manufactures talc and that this company will be a rival in business of the W. H. Loomis Talc Corporation, would place the Loomis Corporation in the situation of practically buying power from a competitor, and in periods of low water this situation might be unfortunate.

There is no written contract for the lease of these powers between the International Pulp Company and the Oswegatchie company. If it so desired the Pulp company could apparently refuse to continue to lease to the Oswegatchie company, which would leave the Loomis company absolutely with no source of power. It does not seem to be just to place this new company in such a position. Even if written leases were given including ones for the undeveloped power at Hyatt and McAllister, the Oswegatchie company would not seem in its present financial condition able to expend \$125,000 for the development of even the Hyatt power. The company pays no dividends, and its operations since 1912 show a loss. Its capital stock is \$60,000 with no bonded indebtedness, no outstanding notes, mortgages, or

preferred stock; its net assets are \$135,926.34. [Minutes page 33.]

Even under the most favorable circumstances it is apparent a considerable time must elapse before an additional 200 or 300 hp. can be developed. The demand exists, a company is able and willing to supply it. Public convenience and necessity will be served if the application is granted. An order will be entered accordingly.

All concur.

In the Matter of the Complaints of RESIDENTS OF THE HAMLET OF NORTH CREEK AND THE TOWN OF JOHNSBURG, Warren County, *against* THE DELAWARE AND HUDSON COMPANY as to passenger train service between North Creek and Saratoga Springs (Adirondack Branch).
[Case No. 7796.]

It is the duty of a railroad company to render adequate passenger service. It is not excused from the performance of its duty in that regard by reason of the fact that at certain times of the year such service will prove unprofitable.

Under the facts of the case, *held* that a two train passenger service, daily except Sunday, should be installed.

Decided November 9, 1920.

Appearances:

Mrs. Cora Montgomery, North Creek, and *Mr. Robert Waddell*, North Creek, for the complainants.

Lewis E. Carr, Jr., Esq., Albany, for the respondent.

KELLOGG, Commissioner:

This proceeding is brought before the Commission upon the complaints of one hundred and ninety residents of the town of Johnsbury, Warren county, N. Y., which includes the hamlet of North Creek. The application is for an additional train each way, daily except Sundays, upon the Adirondack branch of the Delaware and Hudson railroad extending from Saratoga Springs to North Creek. The conditions surrounding the passenger train service furnished upon this line were considered by this Commission in case No. 6998, in which an order was entered October 14, 1919, denying an application for a change of time in the operation of the single passenger train operated upon this branch during the winter season. Prior to January 27, 1918, there had been operated upon this branch for many years train

service in the winter time consisting of two trains each way, daily except Sundays; trains leaving each end of the line in the morning and in the afternoon. This service was curtailed on that date by reducing the train service to one train each way, which condition continued until the installation of the schedule for the summer following. When the winter schedule for the next season was put into effect only one train each way was provided for until February 2, 1919, when the double train service was restored.

During the winter of 1919-1920, only one train was operated, and the action of this Commission in case No. 6998 referred to was based upon a consideration of the question as to whether in the operation of a single train daily it should leave the southern terminus in the morning, returning in the afternoon, or *vice versa*. It was decided by the Commission that the operation proposed by the company of having the train leave the southern terminus in the morning and return in the afternoon was preferable to the reversal of the operation on account of the mail service and other conditions, discussed in the Opinion in that case. The Opinion closed with the following declaration:

The petition should be denied, therefore, but it should be expressly understood that denial of this petition to transpose the one train service does not in any way commit this Commission upon the proposition as to whether or not a single train service is adequate for the needs of the communities, and whether the double train service, which has existed at all times except for fractions of two winter seasons, should not be restored to secure such adequacy. This question should be open for uninfluenced consideration in case application is made for its consideration by this Commission.

The question now, therefore, is squarely before the Commission to determine whether during the coming winter season there should be a double or a single train service daily in each direction. The statutory provision on the subject is section 51 of the Public Service Commissions Law. as follows:

Power of Commissions to order changes in time schedules; running of additional cars and trains.—If, in the judgment of the Commission having jurisdiction, any railroad corporation or street railroad corporation does not run trains enough or cars enough or possess or operate motive power enough, reasonably to accommodate the traffic, passenger and freight, transported by or offered for transportation to it, or does not run its trains or cars with sufficient frequency or at a reasonable or proper time having regard to safety, or does not run any train or trains, car or cars, upon a reasonable time schedule for the run, the Commission shall, after a hearing either on its own motion or after complaint, have power to make an order directing any such railroad corporation or street railroad corporation to increase the number of its trains or of its cars or its motive power or to change the time for starting its trains or cars or to change the time schedule for the run of any train or car or make any other suitable order that the Commission may determine reasonably necessary to accommodate and transport the traffic, passenger or freight, transported or offered for transportation.

This branch is the sole means of communication, so far as railroad facilities are concerned, with the outside world, of a very substantial area, considerably more than one thousand square miles. In that area it enjoys a monopoly of the freight and railroad passenger business. It has no competition to meet, except in the summer time with certain bus lines which touch certain of the communities on its line which are also on the state highway system and afford them such limited facilities as carriers of that kind can supply.

On account of the severe winters and heavy snow storms it appears that upon an average for four months in each winter season the highways are not traversible by automobiles, and therefore these bus lines are discontinued. The following is a list of the various towns tributary to this line and dependent upon it for all railroad facilities, with their resident population according to the last fully reported census of 1915:

Counties	Towns	Population 1915
Saratoga.....	Greenfield	1,642
	Corinth	2,061
	Hadley	689
	Day	541
	Edinburgh	785

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Counties	Towns	Population	
		1915	
Warren.....	Stony Creek	719	
	Thurman	809	
	Johnsburg	2,358	
	Luzerne	1,070	
	Warrensburgh	2,311	
	Chester	1,630	
Essex.....	Horicon	1,056	
	Minerva	705	
	Newcomb	511	
Hamilton.....	Schroon	967	
	Indian Lake	1,086	
		<hr/> 19,540	

Under the present operation, none of the inhabitants or transient dwellers in this area can by means of a railroad leave their homes, transact business at points southerly during the daytime, and return in anything short of a trip that consumes the substantial portion of three days. The natural points of business interest for these people are toward the south. Saratoga Springs, the southern terminus of the branch, is the point of its connection with the main line of the Delaware and Hudson, and from this point access may be had to the cities of Albany, Troy, and Schenectady; and under the double train operation which prevailed in former years in the winter time, passengers might leave their homes along the line, spend a substantial and sufficient time for the transaction of ordinary business at these points, and return the same day.

In addition, passengers from points on this line north of Thurman station, after traversing a short distance by stage from that point, could reach a trolley line which connects with the county seat of Warren county at Lake George and the city of Glens Falls, which is the largest commercial center in that portion of the State. Whereas these points may now be reached by motor bus lines over the state highways, such facilities are not available, as has been stated, during the months of the winter season on account of the heavy snows preventing automobile transportation.

This railroad enjoys a very substantial revenue, the amount of which has not been disclosed, from the passenger travel during the summer season, during which three trains

each way are operated. It also has the entire monopoly of the freight business in this very substantial area, for which, in addition to the various increases permitted during war time and during governmental control, it has lately been permitted to file tariffs increasing its rates to the extent of 40 per cent additional.

That the service rendered and hereinbefore described is wholly inadequate, and calling for the action of this Commission in accordance with section 51 of the Public Service Commissions Law above quoted, would seem almost to go without saying. It is contended, however, by the railroad, and the attention of this Commission is very properly brought to the fact, that the operation of an additional train would not prove profitable. To sustain this contention the railroad has offered evidence to the effect that to operate an additional train each way would cost \$3926 per month. It is also shown that during the twenty-six days of operation from September 23, 1920, to October 22, 1920, the earnings of the trains now operated in the opposite direction, one each way, aggregated only \$2689.84. The month in question was after the close of the summer season and during that portion of the year when automobile competition and consequent depletion of patronage was still effective. The same argument might be made against the running of any train on The Delaware and Hudson Company's lines in the winter time, as it appears from the evidence that they are all unprofitable. But where a railroad enjoys a very substantial freight revenue and also a large summer passenger travel, it can not be excused from rendering adequate service upon a showing that for a particular month or a particular season of the year the operation of such adequate service does not in and of itself produce sufficient revenue to make that particular and limited portion of its business profitable. Its operations must be considered together, as a whole, and a section of the State such as this, consisting of sixteen different towns containing a population which although sparse

approaches twenty thousand people in the aggregate, should have a means of communication throughout the year with the outside world so that business can be transacted to a reasonable extent in the business centers without requiring the substantial portion of three days to be devoted to the purpose.

The branch in question was constructed originally under the provisions of chapter 236 of the laws of 1863. By this act the corporation was permitted to purchase, take, and hold forest lands to the extent of one million acres, and all such lands so acquired were exempted from taxation until September 12, 1883, a period of over twenty years. This very substantial privilege granted by the State, while perhaps it does not add to the duty of the company to furnish adequate service over the line constructed pursuant to this provision, at least forcibly directs our attention to the propriety of directing the discharge by this company of the duty imposed by law on all railroad companies. This Commission has at various times directed the installation of adequate passenger service even where that particular operation is not shown to be profitable. (*Citizens v. G. & J. R. R. Co.*, 2 P.S.C. 2nd Dist. Reports 37; *Agor v. Mahopac Falls R. R.*, 2 P.S.C. 2nd Dist. Reports 560; *Agor v. Mahopac Falls R. R.*, 3 P.S.C. 2nd Dist. Reports 46; *Agor v. N. Y. C. R. R. Co.*, 5 P.S.C. 2nd Dist. Reports 208.)

In the matter of the complaint of the *City of Oswego and Others v. D., L. & W. R. R.*, 4 P.S.C. 2nd Dist. Reports 36, this Commission directed the reinstatement of certain discontinued trains over the line of the respondent between Oswego and Syracuse. In a proceeding subsequently had in the United States District Court, the Commission was restrained from putting this order into effect. (See *D., L. & W. R. R. v. Van Santvoord*, 216 Federal Reporter, 252; *D., L. & W. R. R. v. Van Santvoord*, 232 Federal Reporter, 978). An examination of these opinions, however, indicates that the situation in that case has no resemblance to the case

at bar. There were four additional trains each way still operated over the respondent railroad. In addition, the communities were served by a branch of the New York Central railroad and a branch of the New York, Ontario and Western railroad; and besides all these, there was an inter-urban trolley system operating half-hourly during the day and a large part of the night. In the instant case, as we have seen, there is no railroad service except that furnished by the respondent and no other service whatsoever for a very substantial portion of the year.

The decision of the United States Supreme Court in *Atlantic Coast Line v. North Carolina Corporation Commission*, 206 U. S. 1, is helpful in this connection. In that case the state commission had ordered certain train connections to be made. Various objections to this order were made by the company and urged in the Supreme Court. Among others was the following: "That however otherwise just and reasonable the order may have been it is inherently unjust and unreasonable because of the nature of the burden which it necessarily imposes." In considering this proposition the court used the following language:

This proposition is based on the hypothesis that the order, by necessary intendment, directed the Coast Line to operate an additional train, although such train could not be operated without a daily pecuniary loss. . . . The contention is that the fact that some loss would result from the requirement that the extra train be operated, in and of itself, conclusively establishes the unreasonableness of the order and demonstrates that to give it effect would constitute a taking of property without due process of law in violation of the Fourteenth Amendment. . . . (pp. 23, 24).

But this case does not involve the enforcement by a state of a general scheme of maximum rates, but only whether an exercise of state authority to compel a carrier to perform a particular and specified duty is so inherently unjust and unreasonable as to amount to the deprivation of property without due process of law or a denial of the equal protection of the laws. In a case involving the validity of an order enforcing a scheme of maximum rates of course the finding that the enforcement of such scheme will not produce an adequate return for the operation of the railroad, in and of itself demonstrates the

unreasonableness of the order. Such, however, is not the case when the question is as to the validity of an order to do a particular act, the doing of which does not involve the question of the profitableness of the operation of the railroad as an entirety. The difference between the two cases is illustrated in *St. Louis, etc., Ry. Co. v. Gill*, 156 U. S. 649, and *Minneapolis & St. Louis R. R. Co. v. Minnesota*, 186 U. S. 257 (pp. 24, 25).

After conceding for the purpose of the argument certain contentions made by the railroad company, the court proceeds:

Neither of these concessions, however, can control the case in hand, since it does not directly involve any question whatever of the power to fix rates and the constitutional limitations controlling the exercise of that power, but is concerned solely with an order directing a carrier to furnish a facility which it is a part of its general duty to furnish for the public convenience. The distinction between an order relating to such a subject and an order fixing rates coming within either of the hypotheses which we have stated is apparent. This is so because as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not in and of itself necessarily give rise to the conclusion of unreasonableness, as would be the case where the whole scheme of rates was unreasonable under the doctrine of *Smyth v. Ames* or under the concessions made in the two propositions we have stated. Of course the fact that the furnishing of a necessary facility ordered may occasion an incidental pecuniary loss is an important criteria to be taken into view in determining the reasonableness of the order, but it is not the only one. As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance (pp. 26, 27).

This authority was cited with approval and largely quoted from in *Missouri Pacific Railroad Co. v. Kansas*, 216 U. S. 262.

The principle here contended for and applied in the cases cited was again reiterated by the Supreme Court of the United States in *Ches. & Ohio Ry. v. Pub. Service Com.*,

242 U. S. 603, where Justice Van Devanter in his opinion, at page 607, writes as follows:

One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the State and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss.

Upon the hearing the attention of the sitting Commissioner was called to the fact with some emphasis that there was no complaint made by any locality other than that of North Creek and the surrounding town at the northern terminus of the railroad. This fact does not, however, lessen the duty or the responsibility of the Commission. It would be its duty on its own motion, without any complaint whatsoever, to remedy a situation where inadequate train service was being rendered.

The double train service which existed for so many years and was only interrupted by war time conditions should be restored. It may even be that the patronage accorded to it, supplying as it must a substantial need in the winter time when auto bus communication is not feasible, will far exceed the expectations of the railroad company; but even if it does not prove profitable the duty to render adequate service to this widely extended area from which this company receives a heavy passenger revenue in the summer season, and the entire revenue from incoming and outgoing freight during the whole year, should be enforced as required by the provisions of section 51 of the Public Service Commissions Law.

All concur.

702 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

Vol. 9, 1920

Petition or Complaint of SOUTHERN NEW YORK POWER AND RAILWAY CORPORATION under subdivision 1, section 49, Public Service Commissions Law, and section 181, Railroad Law, for permission to increase passenger fares except in the city of Oneonta. [Case No. 7771.]

Increase in fares: Flat rate on Southern New York Power and Railway Corporation outside of city of Oneonta increased from 4 to 5 cents per mile. Sale of mileage books discontinued.

Decided November 16, 1920.

Appearances:

N. P. Willis for petitioner.

No one else appeared officially.

Hearing at Cooperstown October 4, 1920.

VAN NAMEE, *Commissioner:*

The Southern New York Power and Railway Corporation operates an electric railway from the village of Mohawk to the city of Oneonta with a branch extending from Index to Cooperstown and a local system of street railroads in the city of Oneonta.

This application is for an increase in passenger fares on that portion of its line outside the city of Oneonta from 4 to 5 cents a mile, and for the discontinuance of the mileage books which now sell for 3½ cents a mile. No change from the present schedule now in force within the limits of the city of Oneonta is asked.

By an order of this Commission made the 31st day of December, 1918, in case No. 6601, the fare on this road was increased from 3 cents per mile for both straight fare and mileage books to 4 cents per mile straight fare and 3½ cents for mileage books. That proceeding and the present one were brought under section 57 of the Railroad Law and section 49 of the Public Service Commissions Law which

allows the Commission, upon a petition being presented claiming that the present rates are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, to determine "the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum" fares, notwithstanding the provisions of the statute fixing fares. (*People ex rel. Ulster and Delaware R. R. Co. v. Public Service Commission*, 177 A. D. 607; affirmed 218 N. Y. 643.)

The statement of the general conditions of the road, the attendant circumstances of its operation, and the reasons given by Commissioner Cheney in case No. 6601 for granting the increase asked apply to the present case. It remains for the company to show that the increase then granted was not sufficient to yield a reasonable compensation for the service rendered.

The income statement attached is taken from the books of the company for the calendar years 1916 to 1919 inclusive, and for the twelve months ended July 31, 1920. It shows the actual operations for one year and seven months under the fare increases granted in case No. 6601, and the table for the year ended July 31, 1920, shows actual results under the increase of fare and the increase of labor and other operating expenses. For the year 1919 there was net income of \$28,249, but this amount, apparently available for dividends, was a book figure only. In his opinion Commissioner Cheney called attention to the fact that the company has never made any provision for a depreciation reserve. Following the suggestion of the Commission, that at least \$30,000 annually be placed in the account "Reserve for depreciation," the company in 1918 placed \$32,505.98 in such account, and in 1919, \$58,401.35, reducing by that amount the net income and leaving a debit instead of a credit amount available for payment of interest and return on capital.

The large amount charged off for the year 1919 was

intended to be sufficient to bring the accrued depreciation up to an annual 2 per cent since the beginning of operation of the road, and by the balance sheet of 1920 presented in evidence the total depreciation now charged off is \$165,112.72, which is not excessive by any means.

So far as internal evidence goes there is no reason to question the accuracy of the figures submitted. They are in agreement with corresponding figures given in the company's annual and quarterly reports to the Commission, and are not out of line with the experience of other companies as reported to the Commission. The outstanding feature is the large increase in operating expenses during the year ended July 31, 1920, as compared with similar expenses for the calendar year 1919. If this increase represents actual and necessary cost of operation, there is no question that the company will require additional revenue if it is to remain solvent. No complete analysis of this increase is possible from any figures available. The company's petition states in general terms that the increase is due to "the increase in prices, labor, materials, etc.," and it goes on to state particularly that an increase in wages of its employees granted by a board of arbitration in July, and effective from June 1, 1920, will increase the operating expenses for the year beginning June 1, 1920, to the amount approximately of \$25,000. Of course this most recent wage award does not have much effect in an income statement which only goes up to July 31st. The quarterly reports of the company on file with the Commission show for the first six months of 1920 an increase of about \$30,000 in operating expenses over the corresponding six months of the previous year. Of this about \$18,000 is charged to "Power expense," and \$7500 to "Maintenance of way and structures". Other groups show relatively smaller increases with the exception of "Maintenance of equipment expense" which is about \$3000 less for the first half of 1920 than it was for the first half of 1919.

On the whole there seems no good reason to doubt the necessity for these increased costs since they are in line with the Commission's general experience with electric railway operation. Moreover, even if they were found excessive and were materially reduced, the company could still have an income far below the limit of a reasonable return on its invested capital according to such standards as the Commission has applied in other cases.

The fixed capital account as of August 31, 1918, was \$2,123,906.81. On July 31, 1920, it was \$2,203,767, according to the books of the company. The operating expenses include no allowance whatever for depreciation, and it seems apparent that even with a considerable increase in its passenger revenues the company is not likely to have much more than enough to meet its interest and depreciation charges without any allowance for dividends. It is problematical just how much of an increase in revenue will result from a 25 per cent increase in the rate per mile. The company's auditor and treasurer testified [Minutes, page 18] that the proposed increase in the mileage rate would probably give the company about \$16,000 more annual revenue. Even if this were doubled the net income would hardly be enough for a reasonable depreciation charge, and unless it could be shown that the fair value of the investment is less than the \$1,315,278.39 of bonded and current indebtedness—an untenable proposition in view of the way in which the company's fixed capital accounts have been checked by the Commission's examiners—it is evident that there can be no question of excessive earnings when the income is barely sufficient to pay interest and depreciation.

No attempt has been made to estimate the amount of the Federal Income tax. Probably the amount of \$20,027.80, claimed by the company as the taxes chargeable against the twelve months ended July 31, 1920, should be somewhat reduced as a matter of strict theory to conform to the Commission's practice in other rate cases. The actual tax bills

received in 1919, however, exclusive of the Federal Income tax, amounted to \$17,296.89, according to the company's annual report to the Commission, and it is likely that the charge for the twelve months ended July 31, 1920, would be somewhat more than this, even without allowing anything for the Federal Income tax. There is nothing in the evidence to show how much, if anything, should be charged for that during the latest period, but it is inconceivable that the amount could be enough seriously to affect the general result.

The number of passengers traveling on mileage books fell from 33,513 for the year ended July 31, 1918, to 5793 for the year ended July 31, 1920. With the war tax, the rate per mile by mileage book is 3.78 cents as against 4 cents per mile straight fare. In view of the general financial condition of this petitioner and the very slight saving to the public on the mileage books, the company should be allowed to discontinue their sale, and should redeem the remaining unused books or portions of books at their face value upon presentation at any time within one year after the order in this case entered takes effect. No half fare rates for children or other special rate books are issued by this road. The straight fare of 5 cents a mile is a high rate. It may be that the decrease in number of passengers on account of it will more than offset any benefit to be derived from the increase in fare. The necessity for the increase of revenue has been shown. The officers of the company have decided to seek it through this increase in fare, and as it seems a reasonable method of curing the condition in which the company finds itself, the Commission should not refuse its request for this increase unless the Commission has another remedy to present.

The Commission therefore finds that the rates and charges for passenger service now charged by the Southern New York Power and Railway Corporation outside of the city of Oneonta are insufficient to yield reasonable compensation for

the service rendered, and are unjust and unreasonable, and that the just and reasonable rates, fares, and charges for such service to be hereafter observed and in force by it as a maximum shall be at the rate of five cents per mile for tickets and cash fares, and that the sale of mileage books shall be discontinued. This increase in rate and discontinuance of the sale of mileage books shall be effective upon the filing of a tariff by the company to that effect upon 5 days' notice.

Chairman Hill and Commissioners Irvine and Barhite concur; Commissioner Kellogg not present

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Income Statement, Year Ended

Item	Dec. 31, 1916	Dec. 31, 1917	Aug. 31, 1917	Aug. 31, 1918	Dec. 31, 1918	Dec. 31, 1919	July 31, 1920
Passenger revenue.....	Dollars 168,225	Dollars 174,701	Dollars 174,078	Dollars 171,205	Dollars 168,889	Dollars 188,286	Dollars 180,985
Freight revenue.....	47,645	49,899	69,867	98,175	53,658	56,732	68,532
Milk revenue.....	18,628	27,439	30,848	38,811	49,523	65,345	61,769
Sale of power to subsidiary.....	35,232	35,232	18,806	19,193	39,217	46,439	51,494
Other operating revenue.....	17,897	19,200	18,806	19,193	18,261	14,525	15,865
Gross operating revenues.....	252,395	306,470	293,599	327,204	329,061	381,326	384,625
Operating expenses.....	170,510	210,505	191,075	244,587	240,514	288,093	306,583
Net operating revenues.....	81,885	95,965	102,524	82,615	88,237	113,233	78,042
Taxes.....	14,027	12,435	11,860	15,088	16,477	18,108	20,028
Income from operations.....	67,858	83,530	90,674	67,527	71,760	95,125	58,015
Non-operating income.....	10,138	315	3,860	91,070	874	1,960	*220
Gross income.....	77,996	83,845	94,524	66,457	72,135	97,085	57,794
Deductions:							
Bond interest.....	60,000	55,687	Not available	available	{	{	{
Rent interest.....	7,131	6,281					
Other interest.....	7,868	1,141					
Miscellaneous debits.....							
Total deductions.....	67,999	63,110			65,935	68,836	73,791
Net income.....	9,997	20,736			6,200	28,249	*14,997

*Figures showing deficit.

No. 557 : 709

Rates of BUFFALO GENERAL ELECTRIC COMPANY Under Orders of the Commission.

In the Matter of the Petition of BUFFALO GENERAL ELECTRIC COMPANY for order directing amendment of contract for power between petitioner and International Railway Company, by insertion of "coal clause". [Case No. 2590.]

The price fixed in a long term contract by which an electrical corporation agrees to supply electrical energy to a railway corporation, both of which corporations are subject to the jurisdiction of the Public Service Commission, is subject to revision by the Commission if found to be unjustly discriminatory.

Where such a contract provides for the supply of "electrical energy" without specifying the source or method of production, the electric company is at liberty to supply the energy from any source it sees fit and the purchaser may demand the supply of any available energy regardless of the source or method of generation.

Decided November 16, 1920.

Appearances:

Thomas Penney, Ellicott Square, Buffalo, for International Railway Company.

Daniel J. Kenefick and *C. P. Franchot*, 1330 Marine Trust Building, Buffalo, for Buffalo General Electric Company.

HILL, Chairman:

This is a petition by the Buffalo General Electric Company filed October 1, 1920, asking that the Commission make an order directing a change in the rates of charge provided for in the contract for power existing between the Buffalo General Electric Company and the International Railway Company by the insertion of a so called "coal clause" substantially similar to the one described in the Public Service Commission's order of August 31, 1920.

That order was made to apply to the filed schedules of the electric company which fixed the prices for the sale of what is known as primary power, to all of its consumers of such primary power except the International Railway Company. Such coal clause is now in effect pursuant to said order and provides as follows:

If in any calendar month the cost of coal delivered to the company's river station (meaning the electric company) should exceed an average of \$4.60 a ton of two thousand pounds, then consumer will be charged additional for such excess coal cost in the proportion that the kilowatt hours consumed by him during the month bear to the total kilowatt hours consumed by all consumers who use primary power.

The order affects the users of primary power only, they being those taking power exceeding a voltage of five hundred volts. The order was not in terms made applicable to the railway company, and the electric company now seeks to enlarge the scope of the order so as to include the railway company. The reason for the making of the order was the prevailing acute advances in the cost to the electric company of coal used by it in the generation of a part of the power which it supplies.

Much the larger part of the electric company's energy supplied to all consumers is purchased by it in the form of electrical energy from certain power companies at Niagara Falls which create such energy by the use of generating machines operated by turbines which in turn are operated by water. Electrical energy thus produced is generally described as hydro-electric power. Where the hydraulic power is applied directly to machinery without being first converted into electrical energy it is called hydraulic power. Electrical energy generated from steam power is generally referred to as steam-generated electric energy or power.

The basic contract under which the power is delivered was made July 1, 1899, by the Cataract Power and Conduit

Company with the Buffalo Railway Company. Since that date the Buffalo General Electric Company has become the successor of the Cataract Power and Conduit Company, and the International Railway Company has become the successor of the Buffalo Railway Company, and said companies will be referred to respectively as the electric company and the railway company. This contract has since been altered and modified as to the quantities of energy to be furnished, but not as to the description of the power. The contract describes the energy to be furnished as "electrical energy".

The railway company opposes the making of the order prayed for upon two grounds: *First*, that the railway company by reason of certain facts pertaining to its supply of power is differentiated from the other primary consumers supplied by the electric company in such respects that the same reasons which support the application of the coal clause to the other primary consumers do not in justice and equity apply to the railway company's supply of energy; and *second*, that the contract under which it receives its energy calls for a different description of energy or power than that which is furnished to the other primary consumers, its claim in this respect being that the energy for which it has contracted is hydro or hydraulic power as distinguished from electrical energy or power.

This second ground of opposition, which we will consider first, is important, because, if well founded, it must be admitted to greatly strengthen the railway company's contention that the cost of coal which is used by the electric company to generate a portion of its power should not be spread over the railway company; in other words, if the railway company's contract is, as it claims, for hydro or hydro-electric energy exclusively, there may be justice in its position that it is not concerned with any costs of the electric company in the production of auxiliary electrical energy by steam. But we fail to find in the contract any basis for this claim. The contract distinctly provides for "electrical

energy," and while there are incidental references in other provisions of the contract which make it clear that the energy is at least in the main expected to come from the hydro-electric plants at Niagara Falls, the contract is lacking in any condition or provision to the effect that it is to be produced by any particular method or to come from any particular source. While originally all of the electrical energy furnished by the conduit company and its successor, the electric company, was generated by hydraulic power at Niagara Falls, it appears that in or about the year 1916 the electric company constructed and put into operation a very large plant on the Buffalo river near Buffalo for the production of electrical energy from steam produced by coal, and that the electrical energy so produced is used to augment the supply of power from Niagara Falls and is mixed with the last named supply at the busbars in such manner that after the mixture the two products can not be distinguished. It is the cost of coal consumed in this plant which gave rise to the coal clause. Under the contract it would seem that the electric company can provide the electrical energy from any source and by any process it sees fit, and also that regardless of the source or method of generation of the energy so long as it has electrical energy available, from whatever source, the railway company is entitled to demand its delivery under the contract. Indeed, the contract itself contains a provision that the electric company is required to provide "such reserve machinery as will ensure as nearly as practicable the continuity of its supply of electric power to the railway company". So important a question, seriously affecting the respective rights of the parties, would not be left to be determined by inference or to be deduced from the surrounding circumstances, nor do I think it was. It is difficult to suggest any way in which the parties could have expressed themselves more clearly than they have done by the unambiguous description of the power to be furnished as "electrical energy".

We therefore fail to find any support for the claim of the railway company that the demand was limited to electrical power hydraulically produced.

Referring now to the respondent's first objection, namely, that the railway company, by reason of certain facts pertaining to its supply of power, is entitled to be put on a basis different from that of the other primary consumers, and should therefore be exempted from the application of the coal clause, the facts thus advanced are, briefly: that the railway company has erected and maintains a steam stand-by plant which is used as a safeguard against interruptions in service and for aiding the carrying of the peak-load during rush hours; that its contract is for a period of thirty-two years, whereas the contracts of other so called primary consumers are year to year contracts; that the other so called primary consumers in the city of Buffalo must of necessity obtain their electrical energy from the electric company, it having a monopoly there, whereas the railway company by virtue of its franchise has the right to carry power and electrical energy for the purpose of operating its cars in the city of Buffalo and use the streets of the city for such purpose; that the railway company takes its power from high tension lines and steps the power down to a lower voltage and does not therefore require the electric company to spend great sums in providing stations and equipment for transforming, as is the case where it supplies power to other primary consumers who do not have transformer stations; that under the contract between the railway company and the electric company, the electric company has the right to construct, maintain, and operate, free of charge, conduits on railway company's property; that other so called primary consumers are able to pass the burden of increased rates for electrical energy on to their consumers, but the railway company, being limited to rates of fare fixed by law, is unable to do likewise; and finally, that the railway company falls within a different classification under the regula-

tions governing the filing of contracts prescribed by the order of the Public Service Commission.

With respect to all of these considerations, except the two last mentioned, it might fairly be said that if the basic price of the electrical energy were the same to all primary consumers they would perhaps be important and might require careful analysis to determine what if any variation in price should be made as between the railway company and other primary consumers. Such is not the case, however, the basic price to the railway company being .0047 cents per kw.h. as compared with an average of .0076 cents per kw.h. to other classes of primary consumers. It thus seems apparent that all of the considerations advanced by the railway company in this connection were given their due weight and entered into the fixing of the basic price at the time the contract was made. That being so, it would obviously be unjust to weigh them over again and thus give them a double effect.

The claim that the railway company is unable to pass the burden of increased prices on to its consumers, being limited to rates of fare fixed by law, seems fully answered by the decision of the Court of Appeals that its rates are within the jurisdiction of the Public Service Commission; and its final claim based upon the fact that by a regulation of that commission its contract is filed as such instead of being governed by a general classification, is not perceived to have any bearing whatever upon the question here presented.

The status of the railway company as a consumer of primary power seems to have been fixed upon its own insistence in a previous case. (*Fuhrmann v. Cataract Company*, P. S. C. N. Y. 2nd Dist. Vol. 3, p. 736, as amended in 1915.)

The Commission has power to revise the rates if found unjustly discriminatory notwithstanding the term of the contract. (*People ex rel. N. Y. Steam Co. v. Straus*, 186

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A. D. 787 (affirmed 226 N. Y. 704); *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372.)

No claim is advanced by the railway company that the so called coal clause is not just in itself. It would seem to be clearly discriminatory under the circumstances to except the railway company while applying it to other primary consumers.

An order should therefore be made in accordance with the prayer of the petition.

Commissioners Irvine, Barhite, and Van Namee concur; Commissioner Kellogg not present.

716 PUBLIC SERVICE COMMISSION, SECOND DISTRICT

Vol. 9, 1920

In the Matter of the Complaint of the BOARD OF TRUSTEES OF THE VILLAGE OF LYONS, Wayne county, *against* WAYNE TELEPHONE COMPANY as to increase in rates in said village, effective December 1, 1919. [Case No. 7165.]

Where pending the decision of a complaint against rates the utility company files a tariff still further increasing rates, such increased rates come up properly for consideration in the pending proceeding.

Principles governing allowance for intangible assets in fixing a rate base considered and applied.

Eight per cent allowed for return on capital, including allowance for reservations for surplus and contingencies.

Decided November 18, 1920.

Appearances:

Charles P. Williams, Lyons, attorney for the Village of Lyons and for the Village of Sodus.

George S. Tinklepaugh, Palmyra, attorney for the respondent.

KELLOGG, Commissioner:

The Board of Trustees of the Village of Lyons, pursuant to resolution adopted at a meeting held November 20, 1919, filed a complaint against increased rates proposed to be put into effect by the Wayne Telephone Company by tariff filed November 1, 1919, effective December 1, 1919. This company serves substantially all of Wayne county except the town of Savannah. The New York Telephone Company is a large stockholder and is the controlling spirit in the Wayne company, and this increase in rates was made at the time when rates generally were increased throughout the State.

The villages of Sodus and Newark originally complained against the increases made at that time by this company, but subsequently withdrew their complaints so that the matter now comes for decision on the complaint of the Village of Lyons alone.

Various hearings were had at Lyons and Syracuse. Much documentary evidence was submitted and supplementary information required by the sitting Commissioner was furnished. This case is undoubtedly typical of many other situations existing in the State affected in substantially the same manner by the universal increase in rates made effective December 1, 1919, and also affected by still further proposed increases by the New York Telephone Company by tariffs filed, effective September 1, 1920, and by this company by tariffs filed, effective October 1, 1920.

Evidence was taken as to the valuation and revenues and expenses of this company for several years last past, but in view of the very substantial increase in costs which are being experienced of late its earlier experiences are of little value in determining the cost of operation at the present time.

The company was organized in June, 1910, and took over the lines of the New York Telephone Company in Wayne county and also the property of independent lines known as the Wayne-Monroe Telephone Company and the Wayne County Telephone Company. In 1915 complaints against the rates charged by the consolidated company were presented to this Commission by the municipal authorities of the villages of Newark and Lyons in case No. 2216, and as a result the rates were found not unreasonably high and the complaints were dismissed. In that case the computations of capital invested were made upon conditions existing in the years 1912 and 1913.

After that decision the company made application to this Commission for authority to issue \$300,000 in common capital stock. The affairs of the company were then carefully examined by our experts, and in a report accepted by the company and upon which the order of this Commission authorizing the issue of capital stock was predicated, its fixed capital, undepreciated, was valued at \$415,517 as of December 31, 1914. The accrued depreciation at that date was placed at \$67,871, leaving a depreciated value of fixed

capital of \$347,646. The company was allowed to carry its fixed capital at the undepreciated amount of \$415,517. The depreciation was to be made up by the absorption of its corporate surplus of \$16,274, the remainder of \$39,575 to be carried in a suspense account to be amortized annually. This amount was to be made up by annual amortization at the rate of \$4000 a year, which procedure has been followed to the present time. A reserve for accrued depreciation was created by starting with this amount of \$67,871, which has since been added to monthly upon the basis of a theoretical depreciation of \$2000 a month up to the current year when the amount has been increased to \$2200 per month.

This is the theory of the company as to the actual monthly depreciation of the plant and has been the theory upon which it has acted since the order of this Commission adjusting its fixed capital. Inasmuch as the capital of this company was so carefully examined at the time of its application for a stock issue and nothing has occurred in the course of this proceeding or otherwise to cast doubt upon the correctness of entries on the books of the company, it is felt that its values as stated upon the books should be accepted for the purposes of this proceeding.

This value amounted at the close of the last fiscal year, December 31, 1919, to \$488,430. Of this amount, however, there was in reserve for depreciation, as the result of charging off monthly the amount of the theoretical depreciation, and which remained in such fund over and above the actual expenditures for that purpose, \$103,995. This had been allowed as an operating expense, and was therefore contributed by the rate payers, except the above mentioned sum of \$39,575 amortized as directed by the Commission pursuant to its order in the capitalization case.

This leaves a reserve for depreciation contributed by the rate payers, and upon which they should not be charged any return, the amount of \$64,420, which being deducted from the gross fixed capital leaves \$424,010 as the amount of the tangible fixed capital on which the company is

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entitled to a return. This is the value fixed by this Commission in 1916, modified by subsequent additions and withdrawals as shown by the books of the company. It, with additions, is the amount of fixed capital which was accepted by the company when it was authorized to issue its capital stock to the amount of \$300,000. Presumably it contains all that could properly be claimed as fixed capital.

Now, however, the company claims a substantial sum in addition, which it calls "going value".

The order of the Commission was based upon a final report bearing date June 30, 1916, some two years after the decision of the Court of Appeals in the case of *People ex rel. Kings County Lighting Company v. Willcox*, 210 N. Y. 479. At that time public utility companies generally were advised of the right to claim for intangibles and for going value if existing conditions warranted it. The fact that no claim was made at that time goes far to indicate that the company had no substantial asset of value aside from its tangible property.

It now makes claim that to the fixed capital the following items should be added:

Minimum going value elements of property placed in previous exhibit at at least 15 per cent of physical property as in same exhibit, \$455,126.27.....	\$68,269
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In justification thereof the following is submitted:

Preliminary organization and development costs at at least 2 per cent.	\$9,000
"Attached business," measured by commercial costs of securing stations connected December 31, 1919 (5231 stations), at say \$4 per station.....	21,000
Cost of money, i. e. commissions and fees which would be charged by bankers, etc., in securing funds from investors, say at least 5 per cent.....	22,000
Minimum conceivable deficiency in return due solely to time and money necessary to develop a plant and business corresponding to that owned by Wayne Telephone Company on December 31, 1919, say at least 10 per cent. (Actual deficiency under a fair return, as determined by "historical method" over ten year period of company's existence, was about 50 per cent).....	45,000
Total of above items.....	\$97,000
which equals, as a ratio of the \$455,000 for physical elements of property, about.....	21.8%
which latter figures, based upon the above detail consideration of a minimum going value element of property possessed by the Wayne Telephone Company, are to be compared with the claims made in previous exhibit of:	
Going value minimum, at least.....	15%
equalling in amount, as used in exhibit, at least.....	\$68,269

These items are all referred to as elements of "going value". As has already been noted this company was formed by the consolidation of a number of existing companies which served this territory, and under the decision of this Commission in the case of Lockport Light, Heat and Power Company, items of going value are not proper additions to the fixed capital of a consolidated company even if they could properly have been claimed by the constituent companies of which it was formed. The reasons for this rule are carefully discussed on pages 71 and following of that case, reported in 7 Public Service Commission, Second District, Reports, 27.

Furthermore, there is no indication that any of the above contended for items were incurred in any substantial amount either by this company or its predecessors in interest. It is not probable that in the installation of a telephone company any great period of time was lost in non-operation or the other expenses contended for were actually made with one exception.

It is probable that the predecessors of the company must have incurred to some extent organization and development costs, for which it claims an allowance of \$9000. It is true that they did not make this claim at the time of the capitalization case when its fixed capital was being adjusted, but that item is not included in the fixed capital adjustments, and expense of that character must undoubtedly have been incurred. It would seem therefore proper to allow this item.

It should be noted further that the company also has submitted a tabulation in which it attempts to make up a development cost by what is called the Wisconsin or historical method, which consists of capitalizing all deficiencies and return of less than 8 per cent on the investment since its start. This would result in an addition of \$224,603. This of course is a preposterous result, and is not seriously urged by the company. It seems to be based on the theory that the less a company earns the more it is worth, and is

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in nowise warranted by the decision of the Court of Appeals in the *Kings County* case.

As to working capital, the company claims an allowance equal to its cash on hand and materials and supplies. The average amount of materials and supplies on hand for the past two years is \$28,200. The working cash capital which it claims to be necessary is \$24,009.49. It is thus contended that a working capital of \$52,209 should be allowed for this company. This is over 10 per cent of its fixed capital, and would seem to be excessive. The amount claimed by it in the capitalization case and allowed in the order therein was \$32,421, and of this amount it was required that \$15,000 should be used to discharge outstanding obligations. The keeping on hand of so large a quantity of materials and supplies, although perhaps out of proportion to the size of the company, can not properly be criticised, especially in these times. It is not proper to allow, however, in addition thereto a working cash capital of \$24,000 as claimed. Its customers' bills are payable in advance. If any diligence whatever was used in this direction, and to the exercise of some diligence this company must properly be held, such bills certainly could be collected on the average at least one month after the rendition of the service, or two months after their due date. The annual revenues of the last fiscal year of \$163,914 would indicate an allowance for this purpose, adequately sufficient, of \$13,659, the amount of its bills receivable for one month.

Upon the foregoing we may make the following summary:

<i>Fixed Capital</i>		
Book value of physical property.....		\$488,480
Balance in reserve for depreciation December 31, 1919.	\$103,995	
Less	89,575	
		64,420
		\$424,010
Organization and development costs.....		9,000
<i>Working Capital</i>		
Annual revenues	\$163,914	
1/12 of annual revenues.....	\$13,659	
Materials and supplies.....	28,200	
		41,859
		\$474,869

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Allocating the proper proportion of these investments to the city of Lyons, and taking a per station ratio, 13.8 per cent of all the stations of the company being in the Lyons exchange, shows an investment in that area of \$65,532.

In order properly to determine the receipts and costs of operation, we must bring ourselves down to a very late date. These costs have so shifted and so increased that the experience of previous years is not of much value under present conditions. The company submitted an estimate of such costs for the year 1920. This estimate, however, is in a measure problematical, and it is much better to rely on the actual experience.

For the three months constituting the first quarter of the current year, tables were introduced by the company covering these items. These reflected the present costs of labor and material except that one increase in wages was prevalent during only a portion of this period. In order to ascertain for a longer period of time the present experience, determination of this case has been reserved until we could be furnished by the company with a statement including all of the first six months of 1920. This is now at hand. It shows that the two quarters were substantially similar. What slight difference there was showed increased earnings and decreased expenditures, so there can be no reasonable claim made that the first quarter was more advantageous to the company than the period which succeeded it.

To establish this it is not necessary to parallel in full the two statements, the one for the first quarter and the one for the first half year, but it may be advisable to compare a few of the figures to show that there has been no addition to the burdens of the company for the lapse of time since March 31st to which time its computations on the hearing were brought.

	<i>First quarter</i>	<i>First half year</i>
Total revenue	\$6,649.00	\$13,312.00
Earnings per station.....	9.22	18.46
Total expense	5,473.00	10,783.00
Average expense per station.....	7.59	14.96
Balance of the net income.....	1,176.00	2,529.00
Average net earnings per station.....	1.63	3.40

This indicates that the experience of the first quarter, which has been worked out in the exhibits in the case, may be safely relied upon as an indication of the entire experience of the current year.

Having examined the exhibits furnished in this record and without considering them in detail, item by item, the conclusion is reached that they may properly be considered as a basis for action with two exceptions:

First, the item of annual amortization which is sought to be included by the company as an operating expense should not be so allowed. It is a portion of a fund which this Commission required to be assembled to make up a depreciation against which no proper reserve has been accumulated. The company was permitted to carry its fixed capital at its full undepreciated value upon condition that it would make up a sum sufficient to make the reserve equal to the amount of depreciation. For this reason this item should be deducted.

Second, the schedule filed by the company includes, among other taxes, the Federal Income tax. This for the reasons previously stated by this Commission in various cases is not a proper deduction. The tax on the income should not be paid by the rate payers but by the stockholders who enjoy and receive it. This income tax included in the general statement submitted by the company is estimated for 1920 as \$2600, and it is deducted from the amount claimed by the company as a necessary operating expense.

The actual result for the first quarter of 1920, which is in almost exact proportion to the experience of the company for the entire half year, is, therefore, as follows:

Revenues	Whole company	Lyons
Exchange revenues		¹ \$4,832
Toll revenues	\$12,802	1,688
Miscellaneous revenues	488	60
Total revenues	\$12,740	\$6,580
<i>Expenses and deductions</i>		
Maintenance	\$7,237	\$999
Depreciation	6,600	911
Operators' wages	¹ 1,620
Traffic	2,673	869
Commercial	2,687	371

¹ Actual, others apportioned.

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General	\$3,451	\$476
Uncollectible bills	75	10
Taxes	2,850	324
Rents	1,299	179
Totals	\$26,872	\$5,259
Net income .....	.....	\$1,331

An income of \$1331 upon a capital investment to which the company is entitled to a return of \$65,532 indicates a rate of return for the quarter of 2.03 per cent, or an annual return of 8.12 per cent.

The next question to be determined is as to what, under present conditions, is a fair return to be allowed to a public utility corporation. The company justly urged that the present rates of interest are very high. The question therefore arises for our determination as to what is a fair return under modern day conditions. Public utilities are protected by law in their right to earn an adequate return upon invested capital. By reason of this quasi-guaranty, investments in such securities are not entitled to as high a rate of return as investments in industrials which have no such protection.

The Federal Transportation Act, 1920, contemplates a return to carriers engaged in interstate commerce of 5½ per cent for the next two years with an addition permitted by order of the Interstate Commerce Commission of an additional one-half of 1 per cent for the purpose of making improvements. It would be unfortunate indeed at the present time to take any action which would tend to increase rates of interest. There is perhaps no greater menace at present confronting the country than the high cost of money, and it would seem that the rate of 8 per cent which has frequently and usually been considered adequate should be still, for a time at least, adhered to. This rate is 33⅓ per cent above the rate of interest which one citizen in our State is allowed to charge his neighbor, and in view of the assured right of the public utility company of obtaining an adequate return, unless and until conditions materially change for the worse, 8 per cent should be deemed an adequate return upon the investment in cases such as this. This is somewhat

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borne out in the instant case by the evidence of the general manager and chief executive of the telephone company. On page 65, we find in the course of his examination this question and answer:

"Q. What, in your opinion, would be a return on your investment adequate to command capital to carry on the operations of a company of this kind?

A. At least 8 per cent."

He states, however, that no stock could be sold at that rate at the present time, but there is no indication that it could be sold at any rate. It is fair to state that later in his evidence the following question and answer appear:

"Q. Now, Mr. McDonough, in view of the necessity of setting aside surplus to take care of the years in which the return should fall below the standard rate, what in your judgment would be a necessary earning rate for this company?

A. With existing conditions, we should get at least 10 per cent."

This last assumption, however, is unwarranted. There is nothing in the rate making theory which permits an extraordinary rate for the present on the theory that there exists an ultimate chance that sometime in the future the return may fall below the standard rate. The theory is that at the present time the rate should be sufficient to produce an adequate return, and in case it falls below the proper standard or rises above that standard it should be adjusted to meet the changed circumstances. A return of 8 per cent upon the investment, therefore, should in this matter be considered adequate, including whatever necessity may exist, if any, of making reservations out of income for surplus and contingencies.

The above totals indicate a return slightly over 8 per cent, but if these figures stood alone the surplus over 8 per cent is so slight that it would probably be unnecessary for this Commission to interfere with the tariff. There is evidence tending to show that the plant in the Lyons area has a value slightly in excess of the average value of the entire company. The amount of this difference is slight. It is caused by the

installation there of a higher class switchboard. This might reduce still further the apparent slight excess of return over 8 per cent.

At this point, however, another element enters for consideration.

Pending the decision of this case this company, following the example of its principal stockholder, the New York Telephone Company, has attempted to make another general increase in its rates including this Lyons exchange. The individual business line rate has not been altered but all individual residence lines, all party lines and residence rural lines have been increased \$3 per year, an increase of from 8 to 12 per cent. Rural business lines have been increased \$6 a year, an increase of 20 per cent. Extension station rates have been increased \$3 per year, an increase of 33⅓ per cent on business lines and of 50 per cent on residence lines. Although the rates provided by tariff effective December 1, 1919, may not warrant a finding that it is unjust and unreasonable, yet when we find that this tariff yields a full and adequate return, and we find that, pending this proceeding another tariff is filed, which greatly increases that return, it becomes necessary to treat the tariff filed with this Commission pending this proceeding as a component part of this investigation, and make a determination based upon the facts as they now are with the tariff proposed to be effective October 1, 1920, in mind.

The rates, as to the reasonableness of which decision must be made, are the rates provided in the latest tariff filed, which under the law supersedes all former tariffs. The proceeding although originally directed against the tariff of 1919 has, by the filing of the superseding tariff of 1920, during its pendency, been automatically transferred to the latter. This must necessarily be so, otherwise a determination in any pending rate case could be prevented by the filing of superseding tariffs, and the Commission could not function.

This tariff with its large increases of rates above those shown to be amply adequate to secure a proper return, should

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not be permitted to become effective. An order should be made fixing the rates in the Lyons exchange area at the rates stated in its tariff effective December 1, 1919.

It should be borne in mind, however, that this tariff contains the same criticism as the tariff filed at Hudson Falls by the New York Telephone Company, considered in the case of the *Griffin Lumber Company* providing the same charge for additional trunk lines to private branch exchanges as for the first trunk line.

It does not appear in this proceeding, aside from the tariff charge, as to whether service of this kind has been installed at Lyons. It probably is in a minor degree, but the facts in regard thereto have not been developed. This determination ought not to be deemed a decision in favor of the propriety of such charge, but in case complaint is made thereof this Commission should be fully free to follow in regard thereto its decision in the *Griffin* case.

An order should therefore be entered fixing the rates at the amounts specified in the tariff filed November 1, 1919, effective December 1, 1919.

Commissioner Barhite concurs; Commissioner Irvine concurs in result, filing Opinion; Chairman Hill dissents in Opinion in which Commissioner Van Namee concurs.

HILL, *Chairman*, dissenting:

I am compelled to dissent for two reasons. First, I am not prepared to support the proposition that the company is bound in a rate proceeding by the adjustment of its fixed capital accounts heretofore made by the Commission in a capitalization proceeding. In my opinion, in a rate case such adjustments are binding neither upon the utility nor upon the public, and the question of the actual investment or the value of the property devoted to the public use is open to proof. In this particular case I am advised by the chief of the division of telegraphs and telephones that when the fixed capital was adjusted only "bare bones" figures

were included, no allowance being made for overheads. I think the company is entitled to such an allowance, and while the claim for it seems to have been made under the name of "going value," that fact does not change the essence or the merit of the claim.

The other ground of my dissent is my opinion that the evidence and the findings thereon were given too narrow a scope to form a basis for a proper determination of the Lyons rates. The fixing of telephone rates is not an exact science, and in a case like this of a company conducting several contiguous exchanges in a limited area, all interconnected for toll purposes, I think the fixing of the rates in the respective exchanges and for the various services rendered properly have some relation to each other, and while all must be reasonable they can not properly be fixed solely with reference to the rate of return. That, while an important factor, is not the only one which the company is required to consider. (See *Glen Telephone Company* cases, this Commission's Opinion No. 497, page 248 *ante*.)

IRVINE, *Commissioner*, concurring:

I concur in both propositions stated in the Opinion of the Chairman, but I nevertheless concur in the conclusion reached by Commissioner Kellogg upon the case as presented.

I believe that in this and in similar cases the Commission should ascertain, by obtaining a value of the entire property of the company and investigation of its reasonable operating expenses, what revenue is required in order to pay those expenses, taxes, and yield a fair return on the value of the property with a reasonable allowance for surplus and contingencies. By this method the rights of the company and the public as a whole are secured. The burden of raising such revenues should then be distributed among the different localities and different classes of telephone service with regard to the value of the service and the promotion of its usefulness. Nevertheless this case seems to have been pre-

sented upon the theory that the Lyons area should be considered alone. Moreover, there is not such a variety of conditions in the communities served as to indicate that the method I deem best would affect the result reached in the present case.

As to the value of the property, that assumed in the capitalization case was what has come to be termed a bare bones valuation. It included nothing for organization, management, engineering or interest, taxes or insurance during construction. These are not theoretical intangibles but are actual capital costs. They are properly included in a valuation for rate making purposes and they have been uniformly allowed by the Commission and their inclusion has been enforced by the courts. The going value urged upon the Commission by the company in this case is theoretical and largely hypothetical, and should not be allowed, but the costs I have listed should be allowed. We are without satisfactory evidence as to their amount, but the Commission knows from experience in other cases that they must amount to at least 10 per cent of the field cost. If we add to this latter figure, fixed by Commissioner Kellogg at \$424,010, 10 per cent, and then add \$28,000 for materials and supplies and \$13,659 working capital, the result is \$508,070, and apportioning 13.8 per cent of this to the Lyons area we reach a rate base for that area of \$70,014. The quarterly income of \$1331 indicates a return of about $7\frac{2}{3}$ per cent on this amount. The complaint against the rates of December 1, 1919, is, therefore, not well founded. It certainly can not be contended that $7\frac{2}{3}$ per cent is an unduly high return under present conditions. The evidence was all taken before the tariffs filed to be effective October 1, 1920, and before the amendment of section 92 of the Public Service Commissions Law by chapter 957 of the laws of 1920 took effect. The increase sought to be effected by the latter tariff is under

suspension, and the burden of proof is now upon the respondent to justify that increase. On the evidence now before the Commission it is not justified.

I think, therefore, that the proposed order should be entered, but with the right reserved to the respondent if it so elects to make application to the Commission for a further increase.

No. 559 : 731

In the Matter of the Complaint of THOMAS E. RYAN, as Chairman New York State Legislative Board, Brotherhood of Locomotive Firemen and Enginemen, as to methods now in use on railroads in taking mail bags from mail cranes while trains are in motion. [Case No. 6950.]

In attempting to eliminate as far as possible the danger arising from the present method in use on railroads in this State, of taking mail bags from mail cranes, an investigation was made and several changes proposed. They are here described and considered and found not to be practical.

An order entered making the clearance between the center line of the pouch and the center line of the adjacent track not less than 6 feet and 6 inches.

Decided November 18, 1920.

Appearances:

William E. Fitzsimmons, Albany, as attorney for complainant; *Thomas E. Ryan* as Chairman New York State Legislative Board of Brotherhood of Locomotive Firemen and Enginemen, who also appeared in person.

George W. Kittredge, Grand Central Terminal, New York city, as Chief Engineer, The New York Central Railroad Company.

J. M. Crocker, 2004 Grand Central Terminal, New York city, as Supervisor of Mail Traffic, New York Central railroad.

W. H. Riddell, Postoffice Building, New York city, Acting Superintendent of Railway Mail Service, representing Post-office Department.

R. C. Walker, Albany, Superintendent of Mail Transportation, The Delaware and Hudson Company.

James MacMartin, Albany, as Chief Engineer, The Delaware and Hudson Company.

C. P. MacArthur, Buffalo, as Principal Assistant Engineer, The Pennsylvania Railroad Company.

H. A. Derr, Buffalo, as Assistant Passenger Trainmaster, Pennsylvania railroad.

H. Foulkes, 90 West street, New York city, as Mail Traffic Agent, The Delaware, Lackawanna and Western Railroad Company.

Joseph J. Keany, Pennsylvania Terminal, New York city, as attorney for The Long Island Railroad Company.

D. Swift, 90 West street, New York city, attorney; *L. L. Tallyn*, Scranton, Penna., Engineering Department, The Delaware, Lackawanna and Western Railroad Company.

W. J. Gardner, Grand Central Terminal, New York city, for the Mail Traffic Bureau of The New York Central Railroad Company.

P. J. Schardt, New York city, Superintendent Railway Mail Service; and *C. E. Lincoln*, Albany, Chief Clerk Railway Mail Service.

William H. Adey, Albany, Office Engineer, The Delaware and Hudson Company.

VAN NAMEE, Commissioner:

Thomas E. Ryan as Chairman of the New York State Legislative Board of the Brotherhood of Locomotive Firemen and Enginemen filed a complaint with the Commission on July 17, 1919, against the method in use on railroads in this State of taking mail bags from mail cranes while the train is in motion. In the complaint it was asked that the Commission undertake an investigation the purpose of which would be the elimination of the danger from employees coming in contact with mail cranes adjacent to the running tracks of the railroads within the State.

Four remedies were suggested: (1) the creation of a new device; (2) the stopping of trains at stations where mail is to be picked up; (3) the transportation of mail by local trains to central points where regular mail trains are scheduled to stop; (4) the moving of the mail cranes back

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to a point where they would not come in contact with employees.

Public hearings were held in the city of Albany on September 17, October 1, 1919, and October 13, 1920, at which representatives of the complainant, The New York Central Railroad Company, The Delaware and Hudson Company, The Pennsylvania Railroad Company, The Delaware, Lackawanna and Western Railroad Company, The Long Island Railroad Company, and United States Railway Mail Service, appeared.

All of the larger railroads in the State provide mail cranes adjacent to their main running tracks from which pouches of mail are caught by means of a catcher carried on the mail cars. The catcher is operated by one of the mail clerks. The function of this device is to catch the vertically suspended pouch at about its middle on an arm normally hanging down against the car but which is raised to a horizontal position by the clerk when approaching the crane. The pouch then follows the arm of the catcher backward to a goose neck at which it is supposed to come to rest, following which it is disengaged from the supporting fasteners on the crane. These fasteners consist of fingers or snaps to which rings on the ends of the bag are attached, and from which the pouch is supposed to be detached readily when the force exerted by the moving train through the catcher is applied. Considerable dexterity is required on the part of the clerk to catch the pouch with one hand while holding the catcher horizontal with the other, so that the pouch may not slip off and fall to the ground outside the car. Misses, in which the contents of the bag are usually destroyed, occur occasionally through failure of the clerks properly to function. This failure may in some instances be due to irregularity in the placing of the cranes, and also because the bags are not properly loaded or are overloaded, the postoffice department having established a limit of about thirty pounds on the amount of mail which may be caught.

It was shown at the hearing that in order that good mail service be rendered, it is essential that mail be caught at many small communities at which through mail trains do not stop, and where local trains are not available on which to transport mail to central points at which the mail trains do stop. On the other hand it was shown that to thus collect mail for transfer to through trains at central points would very seriously delay mail destined from one local point to another nearby point. The reason for this is obvious when it is understood that under the present method of exchange, mail received at one point may be at once distributed, and should there be mail for the next station in advance it may be thrown off in the exchange which takes place at that point. Under the suggested method of transporting by local trains to a central point, delay incident to the transfer, distribution, and return would be involved, which in some instances might easily be measured in days, where under the present system delivery may be accomplished within a few minutes. It seems to be apparent, therefore, that no relief may be expected from a system involving the use of local trains.

It was shown and seems to be entirely obvious that to attempt to stop mail trains at all points along each railroad where mail originates would so demoralize the service as to incur serious and justifiable complaint.

It therefore appears that the only avenue of relief lies in a readjustment of the clearance now existing between the cranes and the railroad equipment, or a re-design of the cranes so that a clearance between the parts thereof may be afforded which will minimize, if not eliminate, the danger of contact by employees on the trains. It was shown at the hearings that the present standard clearances on the respective railroads within New York state as represented by the distance from the center of the adjacent track to the center line of the vertically supported mail pouch is as follows:

	<i>Feet</i>	<i>Inches</i>
Lehigh Valley	6	9
Buffalo, Rochester and Pittsburgh.....	6	6
Delaware and Hudson.....	6	5
Pennsylvania	6	6
Ulster and Delaware	6	3
New York, New Haven and Hartford.....	6	5
Delaware, Lackawanna and Western.....	6	7
Boston and Albany.....	6	2
Boston and Maine.....	5	11½
New York Central	6	1

On double or single track lines the controlling factor is the distance at which the pouch may safely be taken by the present standard catcher, while on four track lines such as the New York Central railroad, where it is necessary that cranes be placed between tracks, the factor becomes the available space for spacing tracks. There are certain instances also in the case of double and single tracks where limitations are imposed by topographical conditions in the particular locality in question. In the case of the New York Central railroad it was shown that the present clearance between the widest locomotive and the center of the mail pouch is about $12\frac{1}{4}$ inches. It was further shown that by a modification of the crane as well as the catcher this lateral clearance could be increased to approximately $18\frac{1}{4}$ inches, thus affording about 6 inches additional clearance between the pouch and the locomotive. It was suggested during the hearing that the New York Central crane might be further improved by raising the upper arm so that instead of being on a level with the cab window it would be at least the height of the top thereof, the purpose of this being to eliminate the danger of an engineman coming in contact with the arm. In order to demonstrate the feasibility of such a change, a crane embodying this modification was constructed and tested on the electric division of the New York Central railroad. The result of this test indicated that on account of the swaying introduced by reason of the bag having to be suspended at the top from a chain, such a change would not be desirable.

It was also shown that on certain of the railroads mail cranes are now installed which are not used. Obviously obstructions of this character should be removed from the right of way.

A suggestion was made that the pouch should be suspended so that its center line would not be closer than 3 feet to the locomotive, but it was clearly demonstrated that to accomplish the catch under such conditions not only would an unwieldy and excessively heavy catcher be required, but at the same time on account of the much greater reach required it would be an impossibility in the case of those railroads where cranes must of necessity be placed between tracks.

It should be borne in mind also that the results of contact with the pouch itself may be equally as serious as with portions of the supporting crane inasmuch as catches are frequently made with trains moving at a high rate of speed. Therefore, it is essential that any relief afforded must include moving the pouch as well as the supporting elements of the crane. The pouch, of course, if supported with the opening at right angles to the rails would be at least 6 inches closer to the locomotive than the supports, and therefore the clearance referred to above would be reduced from $12\frac{1}{4}$ inches to about 6 inches in the case of the New York Central railroad.

From the foregoing, apparently the only relief which may be afforded in this matter is that the clearance between the center line of the pouch and the side of the largest locomotive be increased so that the center line of the pouch shall not be closer than 6 feet 6 inches to the center line of the adjacent track. In the case of most of the railroads this involves only a slight change in the location of the stand supporting the crane, but in others a re-design of the crane itself will be necessary.

An order should be entered accordingly.

All concur.

No. 560 : 737

Petition of THE NEW YORK CENTRAL RAILROAD COMPANY under section 54, Railroad Law, for consent to the discontinuance of the services of an agent at the Forbes Avenue station of said company in the city of Rensselaer. [Case No. 7811.]

Where the revenues of a suburban station are depleted by raising the rate of fare to a point beyond that which the traffic will bear, and which diverts former patronage to a trolley line connecting the same points, such condition gives no adequate reason for the discontinuance of the services of an agent at the station.

Previous rulings of the Commission in such cases, as to consideration to be given to increased cost of operation due to high salary paid the agent, followed.

Decided November 23, 1920.

Appearances:

Visscher, Whalen, Loucks & Murphy (by Mr. Loucks) for the petitioner.

Arthur B. Lanphier, Corporation Counsel, for the City of Rensselaer, in opposition.

KELLOGG, Commissioner:

This is an application to discontinue the Forbes Avenue station in Rensselaer as a passenger agency station. Similar applications have been frequently considered by this Commission, and the principles on which its decision should rest fairly well established.

The petition is based upon two grounds, the increase in salary of the agent, and the decrease of revenue. It is proposed to abandon the sale of tickets and the handling of baggage, and the performance of other duties usually performed by an agent; and to install instead a caretaker whose only duties will be to keep the station warm and clean.

That there has been a marked increase in wages paid the local agent appears from the evidence. It has been the com-

mon experience throughout the State and Country. In this particular case the monthly wages of the agent were increased from \$50 in 1915 by various steps so that they reached at the highest point \$148.48 for June, 1920. Owing to the lessening of the length of hours at that time the wages have been slightly reduced, so that in September they amounted to \$127.60, an increase of 150 per cent over the wages paid for many years prior to 1916.

During the same period the number of passenger trains stopping at the station was decreased from thirty-six to twenty-six trains, daily except Sundays, so that a substantially increased compensation was paid for a decreased service. The raising of the salary of an agent to a point largely in excess of the wages which were sufficient for materially larger services a few years ago has in various cases been held by this Commission not to be a sufficient ground for the discontinuance of an agency station.

(*Petition United States Railroad Administration*, as to *Solvay Passenger Station*, case decided February 13, 1919, case No. 6695; *Petition United States Railroad Administration*, as to discontinuance of *Wayville and Reynolds Stations*, case decided April 22, 1919, case No. 6638; *Residents of Rensselaer Falls v. United States Railroad Administration*, decided July 3, 1919, case No. 6833; *Petition United States Railroad Administration*, as to *South Corinth Station*, decided July 8, 1919, case No. 6877.)

It appears, however, that there has been a very substantial diminution of the revenue collected at this station. The cause of this is unusual. The station in question is situated in the northerly part of the city of Rensselaer, a municipality which according to the official census of 1915 had a population of 11,210, and is now shown to contain between twelve thousand and fifteen thousand inhabitants. The only other station in this city is a station known as "Rensselaer," farther to the south and at the end of a bridge connecting with Albany.

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This latter station is located in a very extensive railroad yard, and the approach to it is over a bridge about five hundred feet long, elevated above the tracks, which is not accessible to horse drawn or motor driven vehicles. The result is that baggage can not be brought to or taken from this station unless it is carried the length of this bridge.

The stations are situated on the route of a belt line connecting the cities of Albany and Troy.

It would seem from the situation described that from the only station readily accessible for transportation of baggage, there would be a considerable patronage in a municipality of this size. There has been, however, a substantial reduction, but the cause is perfectly obvious, and is not one of which the railroad company can properly complain.

In 1918 there was a substantial curtailment of the service, due to war conditions. Ten trains were taken off, or something more than a quarter of the entire service, and the fare to Albany, a distance of 1.5 miles, was increased from 5 cents to 10 cents, and that to Troy from 11 cents to 18 cents. At that time transportation by trolley to Albany could be had from a point about four blocks from the station, and accommodated a very large portion of the people in the city of Rensselaer for the sum of 5 cents. The necessary result was to very substantially decrease the patronage of this station. It was due, however, to a deliberate act of the Federal Administration in increasing the fare to a point more than that which the traffic would bear, a fare which has since been adhered to by the railroad company since its control has been restored.

In 1917 the revenues of the station were \$1672.90. In 1918, in June of which year the increase of fare became effective, the revenues decreased to \$1198.29. In the year 1919, throughout which the increased fare was effective, the revenue dwindled to \$995.09.

Thus by reason of the increase in fare there was not only a decrease in the number of passengers carried, but a very

substantial decrease in the total revenue. If the company insists on charging a fare so large that about two-thirds of the passengers who formerly patronized this line have had recourse to other means of transportation, it has no standing here to demand the removal of an agent for that reason, especially where the station was maintained as an agency station profitably and successfully from the time of the first operations of the road until the inauguration of the excessive fare.

The failure to maintain an agent at this station would result in the inability to purchase tickets, and prospective passengers would be compelled to pay their fares upon the train, an obligation which perhaps would not be burdensome to those traveling only to points on the New York Central lines, if it were not on account of the consequent difficulty in handling baggage.

The outgoing passenger desiring to travel with a trunk, if there be no agent at the station to check it for him, is supposed to leave it on the platform, notifying the trainman as he boards the car, who will thereupon have the trunk placed upon the baggage car, and the baggage master on the train will issue a check to the passenger. This is not a very serious inconvenience if the passenger understands the method of procedure.

As to incoming baggage, however, more serious inconvenience arises. The baggage can be checked to the station, and if it happens to arrive on the same train that the passenger does, and he understands the proper methods to be pursued, it will be put off at the station, and he will then try to get into connection with some person to have it removed before it falls into other hands. If it does not arrive on the same train with the passenger, it is taken to the next station having a baggage room, and will be returned to the non-agency station on such train as the passenger requests, if the plan works out correctly. This, of course, is an unreasonable inconvenience, and one to which the residents of a

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municipality sufficiently large to be incorporated as a city should not be subjected at their only available railroad station.

Another consideration presents itself in this connection. It is proposed to keep the station heated and clean. It is thought that some person in the neighborhood will be willing to do this for the sum of \$25 a month. Even if this be done, it is quite apparent that with no one in charge of the station to preserve order, with the station open at all times during the day, in view of its situation in a municipality of this size, on the river front, and in the neighborhood of the much larger municipalities of Troy and Albany, it is very likely to become a rendezvous for undesirable characters, and besides becoming unsanitary, its use by unprotected women and children may become very disagreeable, and perhaps dangerous.

The revenues of the station prior to 1918 were substantially more than the cost of maintaining the agent even now. The absence of sufficient revenue to pay his present salary, even if that were a controlling factor here, is due in part at least to and followed the doubling of the fare.

This advance, initiated under Federal control, is still adhered to by the railroad company although figures submitted by it show that in connection with the contemporaneous curtailment of service, it has caused the loss of two-thirds of its former patrons, and a substantial actual loss of revenue.

No telegrams are transmitted at the station, even in behalf of the railroad company itself. A telegrapher is not here needed for the position. No sufficient reason exists why a competent person to perform the simple duties of the place should not be employed at a salary well within the resources of the station.

The foregoing facts suggest that an application on behalf of the natural patrons of this station for a reduction of fares would be more in order than this application to dispense with

the services of an agent, and thus deprive the minority who have the courage and determination to still patronize this station, of the advantages and facilities usually enjoyed by railroad travelers, and to which, except under unusual conditions, they are entitled.

An ordinary business man who, conducting a profitable business, doubles his prices and thereby loses most of his custom, would naturally hasten to attempt at least to restore former conditions. Whether a similar course should be pursued here is not determined. It is not the issue.

The reasons stated suggest the denial of the application.

All concur.

No. 561 : 748

Petition of HOWARD H. VROOMAN under chapter 667, laws of 1915, for a certificate of public convenience and necessity for the operation of a stage route by auto buses in the city of Watertown, it being proposed that the route shall also be operated in and between the city of Watertown and the villages of Cape Vincent, Clayton, and Alexandria Bay, and intervening points. [Case No. 7818.]

Auto bus operation:

Certificate granted for operation between Watertown, Cape Vincent, and Clayton.

Extension line from Clayton to Alexandria Bay refused.

Running of special trips between Watertown and Dexter as part of operation of line between Watertown and Cape Vincent forbidden.

Decided December 2, 1920.

Appearances:

Thomas Burns, 139 Arsenal street, Watertown, for the petitioner.

Francis M. McKinley, Clayton, for Fred I. Dailey.

G. S. McCartin, Watertown, for the Alexandria Bay-Redwood Transportation Company, Inc.

Delos M. Cosgrove, Watertown, for The Black River Traction Company.

VAN NAMEE, Commissioner:

An auto bus line has been operated between the city of Watertown and the village of Cape Vincent, a distance of seventeen miles, for over five years. The first certificate was granted by this Commission to one George W. Blodgett on May 5, 1916, who subsequently assigned it to the Watertown-Cape Vincent Company, Inc. This company on January 28, 1919, transferred its city license to Howard H. Vrooman who has operated the line since, and is the petitioner in this case. These several assignments were without the consent of the Commission, so that this petitioner is

before the Commission asking for a certificate of convenience and necessity under the consent of the City of Watertown granted May 3, 1920.

In addition to operating between Watertown and Cape Vincent he wishes to enlarge his route and carry on the operation between Watertown, Cape Vincent, Clayton, and Alexandria Bay. The distance from Cape Vincent to Clayton is sixteen miles, and from Clayton to Alexandria Bay about twelve miles. The Adirondack branch of the New York Central touches all the villages reached by this proposed line with the exception of Dexter and Alexandria Bay. The railroad was notified of the hearing, but did not appear and raises no objection to the granting of the application.

The Commission has already granted, in case No. 7722, Matter of *Dailey*, consent for the operation of an auto bus line between Clayton and Alexandria Bay and Watertown, and there are also two other automobile lines running between Alexandria Bay and Watertown, one of which, the Redwood-Alexandria Bay Transportation Corporation line, operates over six miles of the road between Alexandria Bay and Clayton already operated by the Dailey route, and the same route over which it is proposed by Vrooman to operate his auto bus.

The routes between Alexandria Bay, Clayton, and Watertown are discussed in case No. 7722, Matter of *Dailey*, decided September 28, 1920, and over the three main traveled roads between these two points auto bus lines now operate, one on each of the three possible routes. If the application in the present case is granted it will parallel one of these lines. The through travel between Cape Vincent and Alexandria Bay passing through Clayton is very light. There is no public convenience or necessity to be served by an additional line between Clayton and Alexandria Bay. At the present time no auto bus line exists between Cape Vincent and Clayton, and it would seem that justice would be

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done and the public convenience and necessity served by allowing the petitioner to operate between Watertown, Cape Vincent, and Clayton, but to refuse that part of his petition which would extend his operation from Clayton to Alexandria Bay.

About midway between Cape Vincent and Watertown is the incorporated village of Dexter, in which are located a number of paper mills employing numbers of men who reside in Watertown. The Black River Traction Company which operates between the city of Watertown and the village of Dexter on the north side of the Black river protests against the operation by this petitioner of a schedule of buses recently inaugurated which operate between Watertown and Dexter only on the Cape Vincent route and which run only at the time when the men are going to or coming from work. The auto bus line runs on the south side of the Black river and from half a mile to a mile away, south of the line of the street car company, though terminating at practically the same place in the village of Dexter. The fare of the street car company is 20 cents while that of the auto bus company is 25 cents. The actual operating time of the street car company is 40 minutes, and for the bus company is 25 minutes, but at the present time while the bridge is being constructed over Court street in the city of Watertown the necessity of transferring passengers by the street car company makes its through trips from the Public Square considerably longer than its regular schedule.

The petitioner wishes to operate between Cape Vincent and Watertown, but the operation above described is practically a new route running between Watertown and Dexter. It would seem to be just to allow the operation between Watertown and Cape Vincent of as many buses as the petitioner desires, but unreasonable to allow special trips to be made for only a part of the distance, especially that part which parallels the lines of The Black River Traction Company. The special buses to Dexter should be discontinued.

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Based on these conditions, a certificate should be granted for operation between Watertown, Cape Vincent, and Clayton.

All concur.

No. 562 : 747

Petition or Complaint of PAVILION NATURAL GAS COMPANY under sections 71 and 72, Public Service Commissions Law, for an order fixing at 75 cents per thousand cubic feet the maximum which may be charged domestic consumers for natural gas in the incorporated village of LeRoy and other municipalities. [Case No. 6976.]

Decided December 9, 1920.

Appearances:

Hon. James M. E. O'Grady attorney for the Pavilion Natural Gas Company.

Hon. Arthur E. Sutherland as attorney for the villages of Perry, Warsaw, Mount Morris, and Leicester.

William J. Flynn, Esq., Village Attorney, for Village of Mount Morris.

William F. Huyck, Esq., Village Attorney, for Village of LeRoy.

BARHITE, Commissioner:

In connection with this case there is presented to the Commission a problem which is bound to recur with increasing frequency. The principle is well established that a fair rate should be sufficient, not only to give a reasonable return upon the investment but to permit the accumulation of a reserve which will safeguard the integrity of the investment. With the experience of many years' operation and the knowledge of the various elements which enter into production, the approximation of the annual operating costs for a manufactured gas plant is not so much a matter of speculation as it is in the case of natural gas companies where the depletion of a natural resource may result in the obsolescence of the entire investment long before the physical usefulness of mains, meters, etc., is exhausted.

In the absence of exact knowledge of the productive life of the gas field, the natural gas companies probably failed during the earlier years of their operations to include in operating expenses an adequate charge for accrued amortization of capital. The lack of effort to conserve a supply of gas both on the part of the companies and their customers indicates that no true conception was entertained of the value of the commodity or the fact that it might diminish in quantity. Now, both the companies and the consuming public are facing a problem peculiar to this class of utilities.

Assuming that the field of the Pavilion Natural Gas Company might at the beginning of operations have been estimated to have a productive life of twenty years, which it appears at the present time would have been a reasonable estimate, one-twentieth of the fixed capital should have been written off during the first year. Suppose, further, that during the fifth year additions to capital were made and the estimate of twenty years was still considered reasonably exact, this additional investment in fixed capital would have to be amortized during a fifteen year period, as it is obvious that while this equipment might have a physical life as long as that installed during the first year, it would have no value as a part of the natural gas plant after the supply of gas is exhausted. It would have only a scrap value. Under this theory the rates of depreciation would necessarily have been much higher than those which this particular company has used.

It may be contended that the consumers during the latter years of the life of the plant should not be penalized for the failure of the company adequately to provide for the inevitable depletion of gas, but practically would it have been possible at the beginning of operations for the company to have foreseen either the exact date of exhaustion of the supply or to have even approximated the life of future investments in plant and equipment?

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In the following tables only a 5 per cent rate of depreciation has been figured in determining operating expenses. This rate is not sufficient to preserve the integrity of the investment, but it is not improbable that if a rate were established which would be sufficient to make up losses applicable to former periods that rate would be so high as to effect a reduction in the number of consumers to such an extent that the revenues of the company would decrease rather than increase.

As regards the particular problem of the Pavilion Company, it may be well to consider the return which the holders of securities have had during its existence. Taking the book value of plant and equipment as shown in the annual reports to the Commission, less the balance in the reserve for accrued amortization of capital as of the beginning of the years 1907-1919 inclusive, there is developed an average annual investment of approximately \$320,000. Upon an 8 per cent basis the security-holders would be entitled to receive during the thirteen years, \$332,800; the records, however, follow: dividends, \$238,000; interest payments (approximately), \$65,000: \$303,000; or a deficiency in return of \$29,800. While this computation may not be accepted as conclusive, either as to amount of investment or as to measure of entire return, it indicates that security-holders have not actually received any portion of their capital investment in the form of dividends, as appears by their sworn annual reports.

A detailed inventory as of June 30, 1916, was submitted by the company. This inventory appears to have been fairly and correctly made by the auditor of the company and the general manager who had been connected with the company since 1906. The values are based upon the actual cost value of the property with a reasonable deduction for depreciation of the different classes of property by reason of the term of service. It was made for the benefit of the company itself for the purpose of determining the actual

value of the property and was not criticized upon the hearing. Omitting the items of cash and accounts receivable, amounting to \$21,206.17, the entire value of the plant and equipment as of the date named was \$638,342.60. In order to bring this value up to December 31, 1919, there may be added additions for the years 1917, 1918, and 1919, as shown in the annual reports to this Commission, together with 50 per cent of the increase reported during 1916, this last amount being necessarily an arbitrary figure based upon the assumption that one-half of the capital expenditures for the year 1916 was prior to June 30th. These additions total \$44,166.22, as detailed below.

Included in the inventory is an item of drilling wells, amounting to \$84,875, which is perhaps subject to scrutiny. While there has been no prescribed classification of accounts for natural gas companies, the tentative classification evidently contemplates that under "initial development" should be included the cost of drilling the original wells, but that subsequent to the commencement of operations any wells drilled merely to maintain the flow of gas should be charged to operating expenses.

Dates given in the inventory indicate that there were four wells drilled in 1906 and five in 1907. These are presumably the same wells referred to in applicant's sheet No. 9, filed April 30th, in which it is stated that one well was drilled in 1905, three in 1906, and five in 1907. Following the year 1907 there were no others reported until 1910, and thus there may be deducted from the \$84,875 the \$64,331.25 representing cost of wells drilled after 1907.

For working capital there has been allowed one-sixth of the total sales for the year plus materials and supplies as shown in the 1919 report. This develops \$33,332.13.

A balance of \$224,629.06 remained in the reserve for accrued amortization of capital on December 31, 1919. This had been accumulated prior to the year 1918, and may be considered as a contribution by the consumer and therefore

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as a proper deduction from the investment in determining a rate base.

In accordance with the foregoing explanation the following figures are submitted as a tentative rate base:

Investment plant and equipment, June 30, 1916, as per inventory	\$638,342.60
Less drilling wells subsequent to 1907.....	64,831.25
	<hr/>
	\$574,011.35
Additions since June 30, 1907:	
1916, one-half of total.....	\$6,861.08
1917	17,324.58
1918	15,547.51
1919	4,438.10
	<hr/>
	44,166.22
	<hr/>
	\$618,177.57
Working capital	33,332.13
	<hr/>
	\$651,509.70
Less the reserve for accrued amortization of capital.....	224,629.06
	<hr/>
Tentative rate base.....	\$426,880.64
Allowing an 8 per cent return the necessary net income should be	\$34,150.45

The company claims a very considerable depletion in the supply of gas since 1916, and the figures in the annual report sustain this contention as indicated by statement of sales below. The quantities are expressed in terms of M cu. ft.: 1916, 639,420; 1917, 525,802: decrease of 17.7 per cent as compared with preceding year; 1918, 337,681: decrease of 35.8 per cent as compared with preceding year; 1919, 239,973: decrease of 28.9 per cent as compared with preceding year. Any attempt to establish the probable decrease in future years is, of course, a venture into the realms of the uncertain, but for the purposes of this case it may be fairly assumed without prejudice to the rights of consumers that such decrease will not be less than 10 per cent of the 1919 sales.

Before estimating any gross revenue, mention must be made of the existing contract between the Pavilion Natural Gas Company and the Tri-County Natural Gas Company. This contract was made on the 22nd day of June, 1909, and provides for the sale by the Pavilion Company to the Tri-County Company of 500,000 cubic feet of gas daily at

fifteen cents per thousand cubic feet. This agreement was made subject to the reservation on the part of the Pavilion Company of sufficient gas to supply for domestic use certain towns and villages along its lines. It was further provided that "if the company could not, because of a falling off in production or from other causes, supply the stipulated amount of gas, then only such gas as the company might have for sale exclusive of the amount reserved should be furnished". The supply of gas is rapidly falling, and the Pavilion Company has not enough to supply its customers. The price paid by the Tri-County Company does not pay to the Pavilion Company the cost of production according to its own figures. This state of affairs is clearly discriminatory against the customers of the Pavilion Company other than the Tri-County Company. The customers of the Pavilion Company should not be required to pay the expense of selling gas to the Tri-County Company at a loss. A rate of thirty-five cents per thousand cubic feet for gas sold to the Tri-County Company should be charged against the Pavilion Company in estimating its operating income. The sales to the Tri-County Natural Gas Company amounted in 1919 to 20,907,414 cubic feet, over 10 per cent of the quantity of gas sold by the Pavilion Company to its other customers.

For the year 1919 operating expenses were \$86,338.92, with no allowance for depreciation. It was stated in the testimony that "it requires more labor to take care of a certain number of wells when the pressure is down than when it is not". This statement appears to be supported by the figures in the annual reports except for the year 1919 when there was a considerable decrease as compared with 1918. This decrease was chiefly in the item "Repairs of wells and field lines". For the years 1916 to 1919 inclusive, operating expenses, exclusive of depreciation, were as follows:

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<i>Gas produced M cu. ft.</i>	<i>Year</i>	<i>Operating expenses</i>
639,420.....	1916.....	\$77,057.13
525,802.....	1917.....	92,330.07
337,681.....	1918.....	103,590.19
239,973.....	1919.....	86,338.92

The report form does not require details of tax charges, and it is assumed that the deduction of \$22,493.12 for the year 1919 contains income taxes which have been held by the Commission to be chargeable against stockholders and not considered as a cost to the consumer in establishing a rate of return. A reduction of 50 per cent in this item has been made before stating a proper revenue deduction. This is, of course, entirely arbitrary.

A tentative income statement based on the foregoing would then contain the following items:

Gross revenue from sales of 197,158,613 M cu. ft. at 30 cents. . .	\$157,726.30
18,816,673 M cu. ft. sold to Tri-County Company at 35 cents..	6,585.84
	<hr/> \$164,312.73
Operating expenses	\$86,338.92
Amortization of capital for 1919.....	30,808.88
Taxes	11,246.56
	<hr/> 128,494.36
Available for return on investment.....	\$35,818.37
Amount necessary for 8 per cent return on rate base of \$426,880.64	34,150.45
Excess of return.....	<hr/> \$1,667.92

The above small excess of return will be more than equaled by the discount allowed for prompt payment and by a falling off of more than 10 per cent in the supply of gas obtained for 1919, which is very likely to occur if the past history of the company is repeated in this particular.

All concur.

In the Matter of Proposed Non-heating of Passenger Waiting Rooms in Stations on New York, Ontario and Western Railway during the coming Winter. [Case No. 7935.]

It is the duty of a railroad company to properly heat all stations provided for prospective passengers awaiting the arrival of trains.

Decided December 14, 1920.

KELLOGG, *Commissioner*:

By letter addressed to this Commission by Mrs. Mable Scott of Walton, N. Y., under date of November 13, 1920, our attention was called to the fact that the station at Colchester, on the Delhi branch of the respondent, was not heated during the last winter season, and had not as yet been heated this year.

Complainant is a school teacher who each day takes the 5:55 p. m. train from Colchester to her residence in Walton. It was stated that in the Winter, many times the train was late, which caused long and disagreeable waiting in the cold without light or fire.

The attention of the company was called to this situation, and inquiry was made as to its intentions in the matter. In reply to our inquiry the following letter was received:

(Copy)

MIDDLETOWN, N. Y., November 18, 1920.

PUBLIC SERVICE COMMISSION, SECOND DISTRICT, Albany, N. Y.

GENTLEMEN:

Referring to your letter of November 16th in regard to heat at the Colchester station:

We have not contemplated furnishing heat at this station during the coming Winter. It is our purpose to cut down our anthracite coal requirements to a minimum so as to permit the coal companies along our line to place every pound of anthracite coal possible on the market for domestic purposes. The Commission, I assume, appreciates the fact that the anthracite coal situation is serious, and there are communities which are likely to go without coal unless the consumption is curtailed or the production is increased. Unfortunately, the soft coal situation

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is such that we have none which can be diverted to other purposes than locomotive fuel.

We have a number of other small stations on our line where we are taking similar action.

Yours truly,
J. H. NUELLE,
General Manager.

Thus it developed that this company proposed not only to leave this station without heat but other small stations along its line, acting on the alleged altruistic motive of saving coal for the use of domestic consumers.

A hearing was appointed to be had before this Commission, upon this general subject of heating of its stations, at the office of the Commission at Albany on December 9, 1920. The company was notified of the hearing, and requested to be represented. It was not represented. Since the hearing this further letter was received from the company:

(Copy)

MIDDLETOWN, N. Y., *December 8, 1920.*

PUBLIC SERVICE COMMISSION, SECOND DISTRICT, Albany, N. Y.

GENTLEMEN:

Referring to your letter of December 3, case 7935, in regard to the matter of non-heating the waiting room at Colchester station:

I had intended to attend this hearing personally, but am unable to do so, and at this instant, I have no one whom I can delegate to represent us at the hearing.

Colchester is a small station about 4 miles from Walton on the Delhi branch, and anything which is done will be for the accommodation of only a few people. If we heat this station this Winter, it will simply divert a certain amount of coal intended for domestic consumption from the market.

We feel that the Commission has full knowledge of the conditions at Colchester, as Mr. Vanneman and Inspectors Stouder and Himes have been over the line a number of times. We also feel that the Commission has full knowledge as to the seriousness of the anthracite coal situation, and therefore we will cheerfully comply with any suggestions, recommendation, or order which the Commission may make in this instance.

Yours truly,
J. H. NUELLE,
General Manager.

It would seem that this failure to heat these small stations in the country at which passengers may be waiting the arrival of trains, often remote from any other shelter, is a neglect of important duty of the company. Probably greater public convenience could be served by the consumption of coal necessary for this purpose than by any other use of the same quantity of that commodity.

These stations are frequently so situated that neighboring shelter is not accessible. Very often prospective passengers ride to them from some distance, and are compelled to wait for a considerable time when trains are late. The duty of the company to keep them warm for this purpose is most apparent, and the excuse offered is decidedly untenable.

To compel passengers to wait in the winter cold for the arrival of trains often delayed must cause not only great discomfort but constitute a serious menace to health.

An order should be entered directing this company to keep all these stations heated at reasonable hours when liable to be used by passengers awaiting the arrival of trains.

Commissioners Irvine and Barhite concur; Chairman Hill and Commissioner Van Namee not present.

No. 564 : 757

In the Matter of the Complaint of WILLIS Z. GEORGIA AS MAYOR OF THE CITY OF OLEAN, under sections 71 and 72 of the Public Service Commissions Law, *against* PRODUCERS GAS COMPANY as to price and pressure of natural gas furnished the public in said city. [Case No. 7330.]

In the Matter of the Complaint of the TOWN BOARD OF THE TOWN OF OLEAN, Cattaraugus county, under sections 71 and 72 of the Public Service Commissions Law, *against* PRODUCERS GAS COMPANY as to price and pressure of natural gas furnished the people in said town. [Case No. 7344.]

In the Matter of the Complaint of the TRUSTEES OF THE VILLAGE OF FRIENDSHIP, Allegany county, under sections 71 and 72 of the Public Service Commissions Law, *against* PRODUCERS GAS COMPANY as to illuminating power, purity, pressure, and price of natural gas furnished the public in said village. [Case No. 7372.]

The first step in an inverted block, or sliding scale upward, rate for natural gas should be sufficiently large to cover the absolute needs of domestic consumers during months of greatest consumption.

Such a rate is established for conservation, and not for revenue purposes.

Various suggestions for conserving and making more uniform the pressure of natural gas considered and remedial measures ordered.

Decided December 16, 1920.

Appearances:

John K. Ward for the complainant City of Olean.

R. Mandeville Troy for the complainant Town of Olean.

J. C. Leggett, Cuba, and *Elliott & Mapes*, Friendship, for the complainant Town of Friendship.

James P. Quigley, Olean, for Producers Gas Company.

KELLOGG, Commissioner:

These cases involve the rates charged, the practices followed, and the regulations enforced by the Producers Gas

Company in its supply of natural gas to the complaining communities.

The source of supply is from wells adjacent to the New York-Pennsylvania state line, situated in the county of Allegany in the State of New York, and the county of McKean in the State of Pennsylvania. The Pennsylvania wells are owned by the McKean Natural Gas Company, a Pennsylvania corporation, the entire capital stock of which, except the directors' qualifying shares, is owned by the respondent.

The main supply is in the State of Pennsylvania, and at a point in the town of Sharon, in that State, the pipe line of the respondent divides into two branches: one extending northwesterly and ultimately supplying the town of Olean, and the 10th and 11th wards of the city of Olean, whose interests are involved in two of these cases; and the other branch extending in a more direct northerly course to the village of Friendship, the complainant in the third of these proceedings.

The causes of complaint are somewhat varied and require separate consideration.

AS TO RATES

By a tariff effective January 23, 1920, the respondent established a schedule in the nature of an inverted block rate for gas consumed in certain communities, including that portion of the city of Olean supplied by it, and the town of Olean. This rate is as follows:

First 5000 cubic feet, 52 cents per thousand.

Second 5000 cubic feet, 57 cents per thousand.

Third 5000 cubic feet, 62 cents per thousand.

Fourth 5000 cubic feet, 67 cents per thousand.

All excess 72 cents per thousand.

There is a discount of 2 cents per thousand for prompt payment of bills, and a minimum charge of one dollar per

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month. The rate previously in effect was 42 cents per thousand cubic feet, with 2 cents discount for prompt payment, and a minimum charge of fifty cents a month.

In the village of Friendship a similar tariff was placed in effect March 6, 1920, where previous to that date the charge had been 37 cents per thousand cubic feet, with a discount of 2 cents per thousand for prompt payment, and a minimum charge of fifty cents a month.

Owing to various delays beyond the control of this Commission, these cases have not been ready for determination and briefs of all parties submitted until within a few days.

The actual experience of the company in the collection of the increased rates, from the time of their institution to the 1st of October, was offered in evidence on the hearing. We therefore have the benefit of the actual experience of the company in this regard.

The evidence given by the company to justify the rates complained of was not contradicted by the complainants, but must stand as established proof in the case so far as it appears reasonable. Counsel for the complainants stated and reiterated in their briefs that the burden of proof is on the company to justify the increase in rates, and upon this proposition they evidently rely, asserting that there is insufficient proof in this respect. This is not the law. The burden of proof is not upon the company to justify the rates established, but is upon the complainant to prove their unreasonableness. (*Peo. ex rel. N. Y. C. & H. R. R. Co. v. Pub. Serv. Com.*, 215 N. Y. 241; *Peo. ex rel. N. Y., N. H. & H. R. R. v. P. S. C.*, 159 App. Div. 531, *affd.* on opinion below 215 N. Y. 689.)

This rule as to the burden of proof was subsequent to the cases cited, changed as to common carriers by chapter 240 of the laws of 1914, and as to telephone companies by chapter 957 of the laws of 1920. As to other public utility corporations, including the complainants here, however, the rule

laid down by the Court of Appeals in the cases cited is still in effect, and the burden of proof is upon the complainant to establish the unreasonableness of the rate.

This rule was forcibly called to the attention of certain of the parties here in a previous case [No. 6748], where the rate then in effect in the city of Olean was challenged. The rate in effect there was permitted to stand, and the complaint was dismissed upon a memorandum which stated —

“The evidence is insufficient on behalf of the complaint to justify an order decreasing the price.”

In view of the fact that the evidence submitted on behalf of the company stands uncontradicted, it is unnecessary to indulge in any elaborate series of computations to justify the rate of fifty cents per thousand cubic feet net. The operations in the town of Olean and the two wards of the city of Olean adjacent are so interlocked that it is proper to consider them together in this proceeding, and in view of the manifest result it is unnecessary to attempt to subdivide them.

The total receipts in these municipalities and the operating expenses for the year 1919 were as follows:

Total receipts for 1919:		
Olean, city	\$30,262.49	
Olean, town	5,323.60	
		\$35,586.09
Operating expenses:		
Olean, city	\$28,951.67	
Olean, town	4,662.71	
		33,614.38
Balance		\$1,971.71

The totals submitted, showing the results of the block rate in effect during seven months of the current year as compared with the corresponding seven months of 1919, show a revenue of \$18,390.83 as against \$17,273.47 in 1919, an increase of \$1117.36, or only about 6½ per cent.

Assuming that this proportion of increase maintains throughout the year, the receipts would be increased by \$1900, producing an income of about \$3900. This does not

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allow for taxes, which amounted to about \$1900. These taxes, however, included the Federal income tax, which under our rulings is not deductible. But leaving all consideration whatsoever of the tax questions aside, the income provides a return of 8 per cent on only about \$49,000.

The figures submitted by the company indicate an investment for the city of Olean alone of \$148,365.72. Although a careful examination and successful criticism might reduce these figures to some extent, it is quite apparent that they can not be reduced to less than one-third of the amount claimed, which would be necessary to justify any proper criticism of the rate sought to be charged.

As to the village of Friendship a similar condition exists. The figures submitted by the company, and the only ones in evidence, showed the operating income for the year 1919 to be \$540.90. This does not include taxes of \$1548.19, which taken into consideration would produce a deficit. Evidence submitted by the company showed bare bones capital investment for that municipality of \$71,536.

Allowing all imaginable increase, from the institution of the rates now in effect, there can under no conceivable circumstances be a successful challenge of the fifty cent net per thousand cubic feet, the rate now in effect.

On the subject of rates, however, another very important question arises for consideration. This is an attempt to put into effect the so called rate now permissible by the legislation of the current year. The theory of a block rate of this nature is that it is not introduced for the purpose of adding to the revenues of the company, but for the purpose of conserving the natural gas supply, upon the assumption that consumers will be careful not to exceed their necessities by a wasteful use of the commodity if the cost of such excess use is placed at a sufficiently high figure.

It is claimed by the company that no added revenue comes from the institution of a scale of this character but that the decrease in consumption offsets the increase in rates, and for

the purpose of saving the commodity and for that purpose alone a scale of this character is permitted. It is asserted that the increase in the price at the various steps reduces rather than increases the revenue. This contention is phrased in the brief submitted by the company, as follows:

"We now come to the consideration of the question as to whether or not the block system will make any change in the existing situation with respect to income and return upon the investment. It is to be noted at the outset that hereafter there will be no power consumers. This increased rate has solved the power user problem and will make available for domestic purposes around twenty-five million (25,000,000) cubic feet of gas heretofore used by them. The sale of this gas to domestic consumers under the block schedule running up to seventy cents (\$.70) *will not bring as large a return* to the company, because the consumers will be much more widely scattered, many of them will not reach the seventy cent rate, which was paid by the power users."

and further —

"We are not asking the increased price for the additional gas used beyond five thousand (5000) cubic feet per month *in order to increase the revenues of the company*, but we are asking it for the purpose of putting the company in a situation where it may realize upon its gas fields for a longer period of time, and to that extent defer the time when the plant of the company will be sold for junk, because of the absolute exhaustion of its gas fields."

To apply properly this principle, it must be determined further what amount is necessary to serve the reasonable minimum needs of the domestic consumer, who is using all due care to prevent waste. To the amount of his reasonable needs, with careful use, gas should be supplied to him at the minimum rate without any addition in cost.

The practical question follows: Is the allowance of 5000 cubic feet per month, the first step of the proposed block rate, adequate to cover the necessary use of the domestic consumer? It is entirely true that during the warmer months of the year, when the gas is not used for heating purposes, the ordinary family can generally get by on that amount of gas, but it should also be permitted to use a

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sufficient amount to include heating with proper appliances in the winter.

On page 66 of the record, counsel for the company stated that the average use per consumer was something over 99,000 cubic feet per annum. The annual report of the company for 1919 shows that 277,334 M cubic feet were furnished to private consumers during the year, and the number of services was 2614, indicating an average consumption of 106,000 cubic feet per service.

In bulletin 102, part 7, of the Smithsonian Institution, entitled "The Mineral Industries of the United States," offered in evidence in this proceeding, it is stated that —

"The average consumption in M cubic feet of natural gas for all the domestic natural gas consumers in the United States is 100 M cubic feet by each domestic consumer annually." [Page 34.]

This would indicate an average monthly consumption of about 8000 cubic feet. The consumption, however, is not uniform throughout the year. On the following page of the same pamphlet there appears a graph which indicates an average monthly consumption by the domestic consumers of Charlestown, West Virginia, during each of the twelve months preceding March, 1918, ranging from 5000 cubic feet in July and August, 1917, to 36,500 cubic feet in January, 1918; and in Huntington, West Virginia, from 4000 cubic feet in August, 1917, to 32,500 cubic feet in January, 1918. This shows that the winter consumption in those municipalities where records have been kept is five or six times the amount consumed in the warmer weather months.

In Olean, which lies somewhat farther north, the disproportion of use during the artificial heating season must be at least as great, and probably would be greater.

The Witness Wyer, called by the company, testified that the amount consumed by the average consumer of 100,000 cubic feet per annum ought by economical use to be reduced about one-third, or to about 5000 cubic feet per

month. This, however, is probably an average monthly use, and can not take into consideration the great fluctuations in consumption due to the absence or presence of the necessity for using the commodity for heating purposes. The witness, however, testified that in his own home he used on the average in excess of 22,000 cubic feet a month, with all the improved efficiency devices in service.

From the foregoing it becomes apparent that the ordinary consumer can not in times of cold weather supply his reasonable needs, when such needs include the heating of his home, by the use of less than 10,000 cubic feet of gas per month.

On the proper theory of the inverted block rate, the first block should be sufficiently large to permit the use of gas for the absolute necessities by the small consumer, and for such gas so consumed he should not be charged an added rate. The first block should therefore be at least 10,000 cubic feet instead of 5000 cubic feet as it now stands in the tariff schedules under consideration. Rates should be fixed upon this basis, applicable not only to the municipalities complaining but effective as well as to all the communities affected by the tariffs in question.

AS TO VARIOUS CONSERVATION SUGGESTIONS

Upon the hearing in these cases, all parties were interested in instituting reforms in methods of use which would result in saving the somewhat shrinking supply of natural gas. It is unnecessary in this case to go into detail as to all of these proposed remedies. They have been carefully considered by this Commission in a general inquiry on the subject, and an order has been made in case No. 7672 covering this company with others. Under the provisions of the order in that case, these various conservation methods will be followed, except so far as modified in special cases by this Commission.

There does appear, however, another step which should be taken here, along the same line, which is not covered by the general order referred to. The evidence indicates that there

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is undue loss in transmission. This should be examined into by the company; and the order herein should provide that meters be installed in such places as will detect this loss in transmission, and that reasonable efforts shall be taken to prevent unnecessary leakage.

The question, which was a matter of considerable controversy upon the hearing in these cases, as to whether or not other sources of natural gas supply were available to this company, seems to be largely an academic question. If under the conservation measures proposed the supply is not reasonably adequate for the consumers to enjoy to the degree its use is enjoyed by other communities similarly situated, it would become the desire if not the necessity of this company to secure natural gas from other sources. If there were shown a wilful disregard of such interests, more than is developed in the evidence here, an order of the Commission directing it to secure any specified available gas supply might become proper.

AS TO THE OPERATIONS OF THE WEST NOTCH PUMPING STATION

The respondent operates at West Notch a pumping station from 6 a. m. to 8 p. m. The cessation of operation of this pump produces a very serious diminution of pressure, which causes the flow of gas to Friendship village to so decrease that the lights frequently go down, and occasionally go out. Furthermore, at times when burners are left at full head to accommodate the lessened pressure and secure as large a flow as possible, the gas returning in force during unguarded hours of the night has produced a most dangerous condition. This irregular pressure should not be permitted to continue.

It is contended that there is no object in using this pump after a vacuum is created. But it has not been shown that it is not practicable to tie in these wells in such a manner as to pump gas from different wells during different periods

throughout the twenty-four hours, in order to supply gas for peak load demands and augment the supply from the main line, thus producing much more uniform pressure.

An order should be made in the Friendship case, therefore, to provide for the continuous operation of this station.

AS TO CHARGES FOR METER INSTALLATION AT FRIENDSHIP

It is alleged in the complaint of the Village of Friendship that every new customer is required to pay the sum of \$10.20 before a meter is installed, and that when the meter is removed one dollar of that amount is retained by the company, and the balance repaid, but without interest. This practice is admitted by the answer.

This company has no right to make a charge of \$1 for the installation of a meter, if for no other reason than because it has filed no tariff providing for such charge. Without discussing the propriety of such charge, if the company attempted to file a tariff including it, it is sufficient for the present to hold that the company is not entitled thereto.

Under section 63 of the Transportation Corporations law, a company has a right to exact a deposit from a proposed customer of an amount sufficient reasonably to cover gas consumption for two calendar months, which sum, however, must be returned with legal interest when the customer ceases to be supplied with gas.

No rent can be charged for the meter (section 66, Transportation Corporations Law). Under section 62 a deposit may be required to secure the payment of the cost of the portion of the service pipe required by law to be paid for by the applicant for service.

The practice of the company in making any other charges in this connection should be prevented by the order to be entered herein.

AS TO COMPLAINTS ABOUT PRESSURE

It is not necessary further to consider this question in this particular case. The general order above referred to in case No. 7672 covers the subject and provides in its sixth paragraph —

The standard pressure to be maintained in the service pipes of all consumers shall be at least four ounces per square inch, and each such utility shall maintain such pressure in its distributing systems as will enable its patrons to secure adequate service when the gas is consumed in proper and efficient appliances and not in violation of any of the provisions of this order.

From the foregoing it appears that the orders to be entered in these proceedings should each of them provide —

1. That the first block at which natural gas shall be supplied at the rate of 52 cents per M cubic feet, with a discount of 2 cents for prompt payment, shall be increased from 5000 cubic feet to 10,000 cubic feet per month.

2. The company should be directed to install suitable measuring devices for the purpose of detecting any unusual or unnecessary leaks in its transmission line, and upon such detection proceed to the prevention thereof.

The order in the Friendship case should further provide —

1. That the pumping station at West Notch be operated continuously.

2. That the practice of the company in exacting any sum of money from a customer at the time of the installation of a meter, in excess of the deposit permitted by section 63 of the Transportation Corporations Law, shall cease, and that such deposits made in compliance with that section shall be repaid with legal interest when a customer shall discontinue using gas supplied by the company.

All concur.

In the Matter of the Complaint of FIRST MORTGAGE AND REAL ESTATE COMPANY OF NEW YORK CITY *against* WESTCHESTER LIGHTING COMPANY, asking that the gas main of said company be extended in Dellwood road, Cedar Knolls, in the city of Yonkers, near Bronxville, and gas furnished a residence on said road. [Case No. 7884.]

Manufactured Gas Utility, Extension of Mains: The grant of power by the State to occupy streets and highways and the consent of the municipal authorities to do likewise are not limitations upon the powers of a lighting corporation organized under the Transportation Corporations Law, but are in the nature of extensions of such corporate power and of the corporation's facilities to do lighting, both public and private.

The requirement of the statute that such corporation shall furnish light to the owner or occupant of any building or premises within one hundred feet of any main of the company does not recognize nor imply that such main shall be in a public street or place.

Power of Commission to Order Extensions not Limited to Public Streets: Under section 65 of the Public Service Commissions Law, the power of the Commission to order reasonable extensions is not limited to extensions in public streets.

Service Pipe in the Street: A complainant being the owner of the fee of a street which has not been accepted as a street by the municipal authorities, having asserted that the same is a public street and insisted that the gas company should so treat the same and should lay a main therein, is by such action effectively estopped from thereafter claiming as against the gas company that the land lying within the street lines is private property and not a public street.

Decided December 16, 1920.

Appearances:

L. D. Garrett, 51 East 42nd street, New York city, for complainant.

B. W. Stilwell and *Wm. J. Clark*, Mount Vernon, and *Martin S. Decker*, 180 Washington avenue, Albany, for respondent.

HILL, *Chairman*:

Respondent is a gas and electric light corporation organized under the Transportation Corporations Law, lawfully doing business in Westchester county and in the city of Yonkers. It distributes and sells both gas and electricity; its gas revenues for the last fiscal year were \$2,695,961 against operating expenses of \$2,314,873; it has been requested by the complainant to extend its main in Dellwood road, which is in a subdivision called Cedar Knolls, in the city of Yonkers.

The complainant has subdivided the plot of land known as Cedar Knolls for residence development, and the same has been partly built up; and the gas mains of respondent have been constructed in part of the streets which have been laid out upon a map of the subdivision, which was filed in the office of the Registrar of Westchester County in 1912.

Such main extends through Dellwood road to a point opposite Beechmont avenue, and up to this point the Dellwood road has not only been laid out as a public highway but the fee thereof has been deeded to and accepted by the City of Yonkers for highway purposes. From that point on to the north the street is shown on the map and has been laid out and thrown open to the public, but has not been conveyed to nor accepted by the city as a public street. The city has, however, laid a water main through this part of the street. The proposed extension of main is for a distance of one hundred feet on that part of Dellwood avenue which has not as yet been conveyed to nor accepted by the City of Yonkers, and is for the purpose of reaching a new ten-room, three-flat house which is nearing completion and which involves an investment of about \$40,000, and is on the first lot beyond the present terminus of the main. The respondent estimates that the annual revenue from its gas which would be consumed in this house would be \$125 per year. While the extension is inconsequential in itself, the

respondent appeared in opposition to the application and filed a formal answer, stating that it desired thereby to raise the question of jurisdiction and power of the Commission to order the extension. The grounds of such objection set forth in the answer are —

1. That the proposed extension would be constructed on private property, because it would be in a so called private street, which is a mere roadway without grade and is neither paved nor curbed and has not been dedicated to nor accepted by the City of Yonkers as a public street.

2. That the company's franchise from the City of Yonkers containing consent for the occupation of streets and highways in that city does not authorize respondent to enter upon and extend its gas mains over private property, and that respondent is without corporate authority under the Transportation Corporations Law to enter upon and extend its mains over private property; that the jurisdiction of the Commission under the Public Service Commissions Law does not authorize the entry of an order requiring respondent to extend its gas mains over private property, and that in this case the entire construction will be over the property of complainant; and the respondent therefore denies that it is under any legal obligation to invest its capital in gas main construction for the benefit and service of complainant on such private property, and that any such gas main extension is as a matter of law the subject of private contract as between complainant and respondent.

Respondent for a further objection alleges that an order requiring the extension in question would be unreasonable because the total investment involved would be \$441.12 with an estimated gross revenue of \$125, while the present average operating cost of respondent in supplying gas is \$1.2065 per thousand cubic feet, leaving an operating income from the sale of such gas of \$4.35 per annum, which operating income would be less than interest upon the capital investment figured at 8 per cent, which is equal to \$35.29 per

annum. Respondent also alleges that its fixed charges on this part of the plant would be \$35.68, and that in order to recover such fixed charges and 8 per cent interest on its estimated investment aforesaid it would require a net return per annum of \$59.55. In other words, that its net return per consumer per annum in order to meet its fixed charges and 8 per cent interest on its investment is \$59.55 per annum as against which its receipts would be only \$4.35 per annum from this consumer.

Reverting to the first and second objections, we can find no ground upon which they can be sustained. The Transportation Corporations Law, under which respondent is organized, gives it the corporate power to manufacture and supply gas for lighting the streets and public and private buildings of such cities, villages, and towns in this State as are named in its articles of incorporation, and the additional power to lay gas conductors through the streets and highways of each such city, village, and town with the consent of the municipal authorities thereof. The grant of power by the State to occupy streets and highways, and the consent of the municipal authorities to do likewise in the respective municipalities, are not limitations upon the powers of the corporation but are extensions of its corporate power and of its facilities to do lighting, both public and private. The corporation is expressly authorized to furnish lighting for private buildings. Such buildings may abut on highways or they may not, but the corporation has the power to light them wherever they may be, within the boundaries of the municipality; in many cases this will be impossible except by crossing private lands with pipes.

This same statute requires such companies to furnish light to the owner or occupant of any building or premises within one hundred feet of any main laid down by any gas light corporation. Such a main might be in a public street and it might be on private property, or it might be on a right of way acquired by the company not in a public street. The

statute does not recognize or imply any requirement that the mains shall be in public streets or places.

Section 65 of the Public Service Commissions Law requires such corporations to furnish and provide such service, instrumentalities, and facilities as shall be safe and adequate, and it has been held under this provision that the Commission may order reasonable extensions of mains without regard to the provisions of section 62 of the Transportation Corporations Law above referred to, which is an independent statutory requirement. (*N. Y. & Queens Gas Co. v. McCall*, 245 U. S. 345, affirming 219 N. Y. 84; *Simpson v. Buffalo Gas Co.*, 2 P. S. C. 2 N. Y. 531; *People ex rel. Pavilion Gas Co. v. P. S. C.*, 178 A. D. 937.)

In the first mentioned case the Public Service Commission ordered the utility to extend its mains a mile and a-half across a swamp and stream, and although it does not appear in any of the opinions in the case under what easements or rights the construction was done, it is quite clear that there was no public street. That was an important case, in which the power of the Commission under section 65 to order reasonable extensions was upheld in the courts of last resort.

This Commission has held that on an application for an order requiring an extension under section 65, the Commission must determine first whether the requirement is reasonable, and if it so determines, then it must fix the terms upon which the service should be rendered. (*Complaint of Draney*, 5 P. S. C. 2nd D. 334.)

Of course it would not be reasonable to require a gas company to lay mains over private property where it had no right of way or easement and is lacking the statutory power of condemnation of such a right of way or easement. It might be unable to procure an easement, or to do so on reasonable terms. The condition in that respect would enter into the reasonableness of the proposed requirement. But in this case the company has fully protected itself by the

acquisition of an easement in this particular street, with carefully worded conditions to protect it against contingencies.

It appears that on July 27, 1917, presumably at the time when the respondent's first extensions of mains were made in the streets, roads, and avenues of Cedar Knolls, the complainant by deed duly executed, granted and conveyed to the respondent the right and easement from time to time thereafter of entering upon said premises and constructing in all of the said streets, roads, and avenues as the same were then established or might thereafter be laid out, mains, pipes, and other fixtures and apparatus of the respondent for conducting and transmitting both gas and electricity and supplying the same to the premises abutting thereon and the occupants of such premises. This deed recites that the lighting company has been organized for the purpose of furnishing and supplying gas and electricity for light, heat, and power, and that the respondent is the owner in fee of Cedar Knolls; and that certain streets, roads, and avenues upon said premises, although not yet accepted by the municipal authorities as public streets, have been projected and partly opened, with lots abutting thereon; and the property owner has sold and is proposing to sell some of the said lots, and desires the lighting company to construct, maintain, and operate its mains, pipes, and other fixtures in the property referred to for the purpose of conducting and transmitting gas for light, heat, and power. The deed, which is in the form of an agreement and is executed by both parties, provides that the grant is made for the purpose of permitting the respondent to enter upon the premises and construct, maintain, and operate through the streets, roads, and avenues as then established or as might thereafter be laid out, the mains, pipes, and other fixtures of the respondent for conducting and transmitting gas for light, heat, and power, and supplying the same in and through such streets, roads, and avenues to the premises abutting thereon and the occupants of such premises, and to such other property or persons as the respondent from time

to time may desire. The deed further provides that the mains, pipes, and other fixtures and apparatus shall at all times remain the property and be subject to the control of the respondent, its successors and assigns, and other conditions for the protection of respondent's rights which are not material here are included.

The distinction sought to be made by the corporation with respect to mains laid on private property and in public streets was fully considered by our appellate courts in *People ex rel. Oneonta L. & P. Co. v. Public Service Comm.*, 180 A. D. 32, affd. 224 N. Y. Mem. p. 86, where the court said:

The proposition that the construction and operation of a lighting system by an electrical corporation is beyond the supervision of the Public Service Commission so long as the electric current is sold and distributed upon private property, contravenes some of the most important purposes for which the Public Service Commission was created and given supervision of this class of public utilities, viz: the protection of the public from improper and dangerous construction, from exorbitant charges, and the protection of the corporation itself from disastrous competition.

The italics are mine, and are used because they are believed to express reasons of peculiar cogency against the narrow limits of corporate power and duty suggested by the respondent.

The proposition that a lighting corporation subject to the jurisdiction of the Commission can dictate its own terms to persons demanding extensions, provided such extensions are not in public streets which have been accepted as such by the public authorities, is not supported by either reason or authority. Indeed, if that were so, the utility could with equal right and justice dictate to such persons its own rates for the supply of gas. Furthermore, the Commission would be powerless to protect lighting companies from disastrous competition under circumstances similar to those which existed in the Oneonta case.

It would seem, therefore, that the objections are not well

taken, that the Commission has full power and jurisdiction to order this extension provided it finds it to be a reasonable one, and to fix the terms upon which such extension should be constructed and the service maintained.

With respect to the reasonableness of the extension, it does not seem open to argument when we consider that the residence for which service is desired is being constructed on the lot lying next adjoining that in front of which the present main ends. If vacant property intervened between the present terminus and applicant's property it might fairly be argued that, depending upon the distance and the prospect of development of the intervening property, the extension was out of proportion to the consumption which could be expected. But the street can not be built up more densely than a house on each lot, and assuming the main to serve both sides of the street, an additional house opposite would constitute 100 per cent development as far as the extension is demanded. Thus the present house furnishes a 50 per cent development. The company shows that the revenue of \$126 per year from this house will be offset by an operating cost of \$120.65. This is the average operating cost of the company's delivered gas. The investment for a four-inch main extension is stated as \$298.44. A four-inch main is larger than is necessary to supply complainant and its use would presumably be later shared by others. Assuming half of the expenditure to be on his account, we have an investment of \$149.22 required to secure a return to the company of \$4.35 over and above costs of operation. This disregards the evidence of the company to the effect that the fixed charges on its entire plant equals \$35.68 per thousand cubic feet of gas sold. This implies that the operating expenses and fixed charges equal \$1.56 per thousand cubic feet sold as compared with \$1.25 charged therefor. If the company is doing business at a loss, that is not complainant's fault; the company and not he initiates the rates. On the theory advanced by the company, and accepting its own

estimates, a price for gas which would meet operating expenses and fixed charges would be sufficient to secure from gas furnished complainant's new house \$36 per year over and above costs of operation. Respondent can not require that new business on the margins of its fully developed territory shall pay a full return. In *N. Y. & Queens Co. v. McCall, supra*, the estimated rate of return on the cost of the extension ordered was from $2\frac{1}{4}$ to 4 per cent per annum. Four per cent on the total cost of \$298.44 is in round figures \$12. Toward this the company says it will receive only \$4.35 at its present rates on the estimated cost and consumption. The difference is \$7.65.

While the deed and agreement covering the easement do not obligate the gas company to make extensions, still we think some consideration should be given to the previous treatment by the parties of extensions in Cedar Knolls. It appears that three extensions have been made: the largest one being in Pondfield road, a distance of about 730 feet; a further extension of about 600 feet in Beechmont avenue to Dellwood road; and the third, a short extension on Dellwood road to the house of Mr. Mallon. The three form a continuous line, from the end of which a further extension of 100 feet is demanded by complainant in this proceeding. The first extension was a six-inch main, laid upon complainant's guaranty of a gross revenue of \$250 per annum. Complainant shows that this guaranteed revenue has been far exceeded and now equals \$1110.25 per year. The next extension was of a six-inch main on a guaranty of \$256.88 from private consumers; and the third short extension, to Mallon's house, was on the payment of the cost of a two-inch main with no guaranty. It appears that the revenues from two extensions which were guaranteed have very largely exceeded the guaranty, the total revenues being upward of two thousand dollars. This has doubtless largely exceeded the expectations of the parties, and we think this fact is entitled to consideration on this appli-

cation. It would seem no more than fair and equitable under the circumstances for the respondent to make the present short extension without further payment or guaranty.

The service pipe from the main to the street line should be furnished by the company. To be sure, the fee of the street has not been conveyed to the city, nor has the city formally accepted this part of the street, although it has improved it by laying a sewer therein. Any question as to whether in a purely legal sense this part of the street is a public street, I think is immaterial as between these parties, for the reason that the ground upon which the gas company is required to lay the portion of the service pipe lying within the street lines is that being in the street it has control of that portion. (*Simpson v. Buffalo Gas Co., supra.*)

The complainant being the owner of the fee of the street and having asserted to the gas company that this is a public street, and insisted in this proceeding that the gas company should so treat the same and should lay a main therein, is by such action effectively estopped from hereafter claiming as against the gas company that the land lying within the street lines is private property and not a public street.

An order will be entered accordingly.

All concur.

In the Matter of the Complaint of RESIDENTS OF THE TOWNS OF PENDLETON AND WHEATFIELD, Niagara county, *against* INTERNATIONAL RAILWAY COMPANY as to alleged excessive passenger fare between North Tonawanda and Hoffman station, and as to heating of Hoffman station building on Buffalo and Lockport branch. [Case No. 7341.]

Rate of fare on electric road; discrimination: It is an unjust and unreasonable discrimination to require passengers riding in two adjoining fare zones to pay more for the through ride than the sum of the two local zone fares, the latter being open to all the world.

Decided December 16, 1920.

Appearances:

Otto Dickow and *Louis Bugenhagen*, North Tonawanda, R. F. D. No. 12, representing complainants.

Cohn, Chormann & Franchot (by Edward E. Franchot), 430 Gluck Building, Niagara Falls, as attorneys for respondent.

HILL, Chairman:

This is a complaint by residents of the towns of Pendleton and Wheatfield, in the county of Niagara, who patronize respondent's railroad from Hoffman station. The grievance set forth is that the respondent charges twenty cents for transportation of a passenger from said station to the city of North Tonawanda, which they allege to be unreasonable, unjust, and discriminatory because the fare charged between North Tonawanda and Martinsville (an intervening station lying within the boundaries of North Tonawanda) is five cents; that the distance between Martinsville station and Hoffman station is only one and one-fourth miles with a fare of five cents, the combination of the two being ten cents as compared with twenty cents which is being charged for the through ride. It is stated further that the fare for

a local ride within North Tonawanda is only five cents, including a transfer to Martinsville, and that passengers bound for Hoffman station who make use of such a transfer are charged twenty cents additional for the ride to Hoffman, only one and one-fourth miles farther on but lying beyond the boundaries of North Tonawanda.

The ground upon which respondent justifies the alleged discrimination is that the five-cent fare, as indicated in the tariff, is a "special" rate between Martinsville and Goundry street. The respondent's position is that the so called "special rates" listed on page 9 of the tariff, which includes the five-cent rate "applicable wholly within the corporate limits of the two cities of Tonawanda and North Tonawanda," are so listed in compliance with certain conditions in consents granted by the local authorities of said two cities for the construction, maintenance, and operation of certain of the lines of respondent which are located wholly or partly upon public streets within said cities; but that the Buffalo-Lockport line, over which the fares referred to in the complaint herein are charged, is not located upon public streets within said two cities, but on the contrary is constructed wholly upon private right of way, partly under lease from a steam railroad company and partly under trackage and other rights granted by such steam railroad company with respect to a steam railroad private right of way between the city of Buffalo and the city of Lockport.

The respondent does not deny that its rate of fare is lawfully limited to five cents in the city of North Tonawanda, which includes Martinsville, but in effect claims that such lawful maximum fare is not available to passengers who are bound to points beyond such fare limits, of which ride that portion lying within the city zone forms a part. That is to say, that while the lawful maximum for all passengers for a ride within the city zone, which extends to Martinsville, is five cents, and the fare established by respondent between Martinsville and Hoffman is five cents, the rider from a

point within the city zone to Hoffman may properly be charged twenty cents.

We are not presented with the question of the lawfulness or reasonableness of the five-cent fare to Martinsville; the company is charging that fare to all the world, and does not question the binding force of the franchise condition by virtue of which it is fixed. The question presented is whether it is an unjust discrimination to charge fifteen cents for a given ride to one passenger and five cents for the same ride to another, the only difference in conditions being that the one is a through and the other a local passenger.

It seems to be settled that the passenger may take advantage of whatever local fares are in force. (*Kurtz v. Penn. Co.*, 16 I. C. C. Rep. 410; *Lodge v. U. T. Co.*, 2 P. S. C. N. Y. 2nd Dist. 555.)

While rates for through interstate service have in some instances been fixed by federal authority which were greater than the sum of the locals fixed by state authority, we find no authority which would support this Commission in sustaining a through rate in excess of the sum of the locals lawfully established within this State. This same question is involved in numerous traffic arrangements throughout the State whereunder interurban roads enter cities within whose boundaries a maximum fare is fixed by conditions imposed by the city authorities, and the question arises whether fares in excess of that limited on the city lines may be lawfully charged passengers entering from outside the city boundaries. If such discrimination is allowed, we then have established two different rates of fare for the same ride. We have also established the proposition that the fare on the through car within the city boundaries is subject to a different regulation, and may be imposed by a different authority than is applicable to the local ride. Without reference to the statute regulating charges for long and short hauls, this would seem to be a discrimination which offends against the

provision of section 49 of the Public Service Commissions Law, which prohibits "unjust discriminations and preferences". It is not apparent that the discrimination in the charge to the two classes of passengers is any the less unjust because one of the local fares is fixed by a franchise condition which has been accepted by the carrier. The local fare is good for all passengers and there is nothing to prevent any passenger paying from point to point, and thus securing the advantage of the lower rate. This being so, the through passenger has no way of escaping the discrimination. If it be claimed that the five-cent fare within the city is unreasonably low, then the proper authority should be appealed to for an increase. No such appeal is under consideration here.

The prayer of the applicants should be granted by an order directing the respondent to amend its tariff in such manner as to bring the through rate complained of into equality with the sum of the local rates.

Commissioners Barhite, Kellogg, and Van Namee concur; Commissioner Irvine dissents.

Petition of JOHN F. SMITH of Lloyd, Ulster county, under chapter 667, laws of 1915, and chapter 307, laws of 1919. for a certificate of public convenience and necessity for the operation of a stage route by auto buses in the town of Lloyd and the city of Kingston, Ulster county, as a part of a route between Kingston and Highland. [Case No. 7849.]

Auto Bus Operation: Operation allowed in the towns of Lloyd and Esopus, Ulster county, from Highland Landing to city of Kingston.

Restriotion of Operation: On account of direct competition with trolley line, a zone consisting of the hamlet of Highland and vicinity created within which the operation of the auto bus line is restricted.

Decided December 16, 1920.

Hearings: October 29, 1920, and December 2, 1920.

Appearances:

A. W. Lent, Highland, for the applicant.

Martin S. Decker, 180 Washington avenue, Albany, for New Paltz, Highland and Poughkeepsie Traction Company.

VAN NAMEE, *Commissioner:*

On September 30, 1920, John F. Smith, a resident of the town of Lloyd, Ulster county, filed a petition with this Commission asking for a certificate of convenience and necessity for the operation of a bus line in the towns of Lloyd and Esopus, Ulster county, over a route beginning at the West Shore railroad station and Ferry landing at Highland Landing, to Highland, a distance of $11\frac{1}{4}$ miles, thence northward on state highway trunk line No. 3, passing through the hamlets of West Park, Esopus, Ulster Park, and Port Ewen, to the city of Kingston, a distance of approximately $15\frac{3}{4}$ miles from Highland village. There are no incorporated villages along this route, and of the towns

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but one, the town of Lloyd, has placed itself within the provisions of chapter 307 of the laws of 1919. The applicant obtained the necessary permit for the proposed operation from the Town of Lloyd on August 2, 1920, and from the City of Kingston on September 20, 1920.

The petitioner proposes to operate four auto buses: two of the capacity of 26 passengers, one of 28 passengers, and one of 18 passengers, according to a schedule filed with his petition. The proposed line will compete in a greater or less degree with the following lines of common carriers already in existence:

1. The New Paltz, Highland and Poughkeepsie Traction Company: this company operates a trolley line from New Paltz to Highland and thence to Highland Landing. From Highland to the Landing, a distance of $1\frac{1}{4}$ miles, the trolley is paralleled by this proposed route.

2. The West Shore Railroad, which has a station at Kingston, and the hamlets touched by this route, but which made no objection to the granting of the petition.

The proposed route at present has no transportation service over the section from Highland to Kingston.

A hearing was held by Commissioner Van Namee at Kingston on October 29, 1920, and at Albany on December 2, 1920. Proper notice was published and given to all interested parties. No one appeared in opposition except the trolley company which objected to the granting of the certificate, claiming that in the present state of its line the paralleling of any part of said line would result in the discontinuance of operation and eventually end in bankruptcy for the road. Evidence introduced at the hearing showed that since the second reorganization of the trolley company in 1902 there has been but one dividend paid to the stockholders, and that was a dividend of 2 per cent paid in 1904. Four per cent interest on the bonded indebtedness of \$100,000 has been paid each year, though in some years, as in 1919, the payment of the interest resulted in a deficit after paying

operating expenses. In 1919 this deficit amounted to \$1185.70.

The number of passengers carried from 1913 is as follows: 1913, 321,617; 1914, 299,060; 1915, 265,541; 1916, 247,649; 1917, 244,034; 1918, 186,723; 1919, 224,268; from January 1 to May 31, 1920, 75,541. While the five months in 1920 are the poorest months of the year, the company will have to carry twice the number in the next seven months to equal the record of 1919.

The company, in common with others of the same character throughout the State, has had to meet the increase in the price of materials and the demands for higher wages by its working force. Wages were increased three times in 1919, the last increase in October of that year bringing the wages up to a point 100 per cent above what they were two years previous. The wages were again increased in June, 1920, and the rate of approximately \$28 a week now paid is by no means high when compared with other companies.

The operating expenses, aside from wages, are not out of proportion. There are four zones on the line. The fare was increased from 5 cents to 7 cents in each zone in November, 1918, and from 7 cents to 10 cents in June, 1920, with a through rate of 35 cents for the four zones. Under the 5 cent fare in 1918 there was a deficit of \$99.72 without any deduction for bond interest. The increase to 7 cents per zone was reflected in the figures for 1919, which show gross revenues of \$34,189.62 and operating expenses of \$29,041.82, without deductions for taxes or bond interest.

No figures are accessible for any part of 1920, but the president of the company stated that the first quarter showed a deficit of approximately \$3000 without deducting any sum for taxes or bond interest. The effect of the increased fare from June 26th and of the increase in wages from June 1st of this year are as yet unascertainable, but it is evident from a study of the table that any decrease of revenue however small is of most serious moment to the

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company, and that the company could not long sustain any active competition.

Except in the Summer, the railroad service consists of a car every half-hour from Highland Landing to Highland and *vice versa*, and every hour between Highland and New Paltz. During the Summer a half-hour schedule over the entire system is maintained. The service meets the early train to New York, and the last car meets the trains which carry the greater proportion of the traffic from New York or elsewhere. There is no complaint of inadequacy of service before the Public Service Commission, nor in our opinion has such inadequacy of service been proven in this proceeding. It is true that the service between Highland and Highland Landing might be improved. The company is unable to obtain permission to cross the West Shore tracks, and a shuttle service is maintained for a short distance. The shuttle car is apparently in bad condition and the company should keep it clean and heated in cold weather. Local conditions seem to make this a difficult matter, but the company itself is penalized in the loss of passengers who patronize the hacks and taxis plying between the Landing and Highland.

It would therefore seem that public convenience and necessity do not require the operation of the bus line paralleling the trolley; but in view of the fact that no line exists from Highland to the city of Kingston, that operation should be allowed, with proper restrictions to safeguard the trolley in that part of the route paralleling its line. At the hearing on December 2nd both the representative for the petitioner and the trolley company agreed upon a point near the village of Highland about a-quarter of a mile from the trolley line, and the petitioner stipulated that he would not take on passengers from the point at the top of the hill on the state road northerly from the line where the New Paltz turnpike and the state road join; and on his southbound trips he would not take on any passengers going to Highland

Landing or intermediate points along the trolley line, nor passengers at Highland Landing or intermediate points to such point at the top of the hill northerly from the New Paltz turnpike. This point is in front of the residence of Louis A. Martin. The attorney for the trolley company agreed that this stipulation was a fair one and met most of his objections, but asked that such stipulation should be printed on the time cards and announcements of the auto bus route. This seems a fair request and should be stipulated in the order.

The Commission will not hesitate to grant certificates where the operation will involve direct competition with existing electric railways, when it appears that the railway is not solving the local transportation problem satisfactorily. (*Matter of Ashmead*, 5 P. S. C. 2nd Dist. Rep. 215.) But that situation does not seem to be before us so far as the route paralleling the trolley line between Highland and Highland Landing is concerned.

An order should be entered containing the usual stipulations and restrictions, together with one containing the restriction as to competition with the trolley company, and one providing for the publication of the notice of such stipulation by the auto bus company.

All concur.

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Petition of JOHN F. SMITH of Lloyd, Ulster county, under chapter 667, laws of 1915, and chapter 307, laws of 1919, for a certificate of public convenience and necessity for the operation of a stage route by auto buses in the town of Lloyd, Ulster county, as a part of a route between Highland and Marlboro. [Case No. 7850.]

Auto Bus Operation: Certificate granted for operation in the towns of Lloyd and Marlboro, Ulster county, between Highland Landing and village of Marlboro.

Restriction of Operation: On account of direct competition with trolley line, a zone consisting of the hamlet of Highland and vicinity created within which the operation of the auto bus line is restricted.

Decided December 16, 1920.

Hearings: October 29, 1920; November 15, 1920; December 2, 1920.

Appearances:

A. W. Lent, Highland, for the applicant.

Martin S. Decker, 180 Washington avenue, Albany, for New Paltz, Highland and Poughkeepsie Traction Company.

Frank W. Brooks, 44 Main street, Kingston, for John A. DuBois.

VAN NAMEE, Commissioner:

On September 30, 1920, John F. Smith, a resident of the town of Lloyd, Ulster county, filed a petition with this Commission asking for a certificate of convenience and necessity for the operation of a bus line in the towns of Lloyd and Marlboro, in the county of Ulster, as part of a route between the hamlet of Highland Landing and the incorporated village of Marlboro, in said town of Marlboro, and passing through the hamlets of Highland and Milton. The village of Marlboro, the only incorporated

village on said route, has not placed itself within the provisions of chapter 307 of the laws of 1919, and of the two towns but one, the town of Lloyd, has so done. The applicant obtained the necessary permit for the proposed operation from the Town of Lloyd on the 19th day of July, 1920.

This petitioner proposes to operate two auto buses with a capacity of 25 passengers each according to a schedule filed with his petition. The proposed line will compete in a greater or less degree with the following lines of common carriers already in existence:

1. The New Paltz, Highland and Poughkeepsie Traction Company: this company operates a trolley road from New Paltz to Highland and thence to Highland Landing. From Highland to the Landing, a distance of $1\frac{1}{4}$ miles, the trolley is paralleled by this proposed route.

2. John A. DuBois, who has a certificate from this Commission to operate a bus line between the village of Marlboro, in the town of Marlboro, southward to and through the city of Newburgh to the shipyards at New Windsor. DuBois at the present time is operating from Marlboro north through the town of Lloyd to Highland and Highland Landing. He has no certificate to operate in the town of Lloyd and so need not be considered in this connection.

3. The West Shore Railroad, which has a station at Marlboro, Milton, and Highland Landing, but which has raised no objection to the granting of the petition.

Hearings were held by Commissioner Van Namee at Kingston on October 29, 1920, and subsequently at Poughkeepsie on November 15, and at Albany on December 2, 1920. Proper notice was published and given to all interested parties. No one appeared in opposition except those noted above. At these same hearings application of this petitioner in case No. 7849 for a certificate of convenience and necessity for the operation of a bus line between Highland Landing and the city of Kingston was considered. In that application, the paralleling of the line of the trolley company between Highland Landing and the hamlet of

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Highland was over the same route as the route concerned in this petition. Reference is made in this opinion to the opinion made and the order entered on December 16, 1920, for a discussion of the trolley company and restrictions which should be imposed on auto bus lines paralleling its lines in the vicinity of Highland Landing and Highland.

Following the reasoning in that case, a certificate should be granted for the operation of the proposed line between Highland Landing and the village of Marlboro, and at the hearing in Albany on December 2, 1920, a stipulation was entered into between the representative of the trolley company and the representative of the petitioner as to the point near the village of Highland which should be the limit of local operation imposed upon the auto bus line. The counsel for the trolley company also requested that notice of this restriction on his operation should be published by the auto bus line in its timetables and literature, and such request being reasonable, should be imposed as one of the conditions of this order.

An order granting the certificate petitioned for, with the restrictions set forth above, should be granted accordingly.

All concur.

In the Matter of Complaint of SOLVAY PROCESS COMPANY
against THE DELAWARE, LACKAWANNA AND WESTERN
RAILROAD COMPANY as to proposed increased rate on
limestone, carloads, from Jamesville to Solvay. [Case
No. 7713.]

The Delaware, Lackawanna and Western Railroad Company has since 1911 transported limestone from quarries of the Solvay Process Company at Jamesville to the plant of the latter company at Solvay, in a manner set forth in the Opinion, under a tariff rate agreed upon between the parties, which until 1918 was 15 cents a gross ton. In 1916 there was a general advance of 5 per cent on freight rates which was not applied to this traffic. Early in 1918, under Federal control, there was a further general advance of 15 per cent which was applied, making the rate 17 cents. The Director General, by General Order 28, in June, 1918, increased rates 25 per cent. The Solvay Company appealed to the Interstate Commerce Commission which in October, 1919, fixed a rate of 25 cents a gross ton. The carrier undertook to apply the general 40 per cent increase of August, 1920, and make the rate 35 cents. The shipper appealed, and the Commission suspended the rate pending investigation. The shipper contended not only that the proposed increase was unjust but that the 25 cent rate was unjust.

Held, 1. That the burden of proof was on the shipper to show that the 25 cent rate has become too high and that the burden was upon the carrier to justify any increase above 25 cents.

2. It must be presumed that the 15 cent rate, reached by agreement between competent parties and effective for years without protest by either, was in its inception fair considering all conditions of the traffic and that it remained fair at least until 1917.

3. It must also be presumed that the 25 cent rate, fixed after full hearing by a body at that time having jurisdiction, was a fair and just rate at the time it was fixed.

4. No changes in conditions having been shown since the 25 cent rate was fixed except the wage increases of July, 1920, and an examination of the evidence showing that 1 cent a gross ton is sufficient to cover the additional expense due to those wage increases, a fair rate at present of 26 cents a gross ton was fixed as a fair rate under present conditions.

5. The reasonableness of a rate can not be determined by a comparison of rates on the same commodity elsewhere, in the absence of evidence showing similarity of conditions.

6. Nor can the reasonableness of a rate be determined by comparison with a single rate on the same commodity even where conditions are largely similar, especially where the carrier is the same and one of the rates may have been fixed with reference to the other.

7. An increase of 40 per cent in the rate on a particular commodity between specified points is not justified by a finding of the Interstate Commerce Commission that a general increase of 40 per cent was required in the entire eastern territory to meet the provisions of the Transportation Act, 1920, in order to afford a specified return to a number of carriers as a group.

8. A higher rate is not justified merely because the shipper is so situated and his business of such a character that he could afford to pay the higher rate and still earn a profit.

9. A rate for a particular commodity between designated points can not be fixed on the basis of the average revenue per ton-mile of all freight transported over the carrier's system.

Decided December 21, 1920.

Appearances:

H. Duane Bruce, William S. Manning, jr., F. S. Nichols, and E. H. Foley for complainant.

J. L. Seager and D. T. Lawrence for respondent.

IRVINE, Commissioner:

The Solvay Process Company has a very large plant in the village of Solvay, west of and adjacent to the city of Syracuse. It is engaged in the manufacture of soda ash, and other soda and alkali products. It has an extensive quarry of limestone at Jamesville, southeast of Syracuse. Limestone is transported from Jamesville to Solvay for the use of the Solvay Company by the respondent, The Delaware, Lackawanna and Western Railroad Company. During the current year the rate for this transportation has been 25 cents per gross ton. As a part of the respondent's tariff filed to become effective August 26, 1920, under Special Permis-

sion No. 7363, issued by this Commission August 19, 1920, whereby freight rates in general were increased 40 per cent to correspond with increases permitted by the Interstate Commerce Commission in its Ex Parte 74, it was sought to increase the rate in question to 35 cents per gross ton. This complaint was thereupon filed, asking for a suspension of the tariff, and that the Commission determine and fix the lawful rate that should be charged for the traffic. Under the reservation contained in the special permission referred to, and in the matter of the application of Steam Railroad Carriers, Case No. 7693, Opinion No. 526 [page 460, *ante*], a suspension and investigation order was entered.

The rates involved have a peculiar history, and the traffic itself is of such unusual character that it is difficult and indeed impossible to apply with exactness and with assurances of a just result, the technical rules usually resorted to in fixing rates.

The Solvay Company formerly obtained its supply of limestone from Split Rock, about four miles from its Solvay plant. This quarry, in 1909, was approaching exhaustion, and the Solvay Company sought other sources of supply. One of these was found at Jamesville. Another one considered was somewhat farther from its plant, on the line of the Chenango branch of the New York Central railroad. Negotiations were entered into between the complainant and respondent for the establishment of traffic arrangements and rates in connection with the Jamesville site. These negotiations were quite extended, but resulted in an agreement contemplating that the Solvay Company should establish tracks upon its property in Jamesville; that an interchange track between its plant tracks and the respondent's should be constructed; that the Solvay Company should furnish the necessary cars; and that the rate should be 15 cents a gross ton. The respondent was to do no switching at either end: it was required merely to haul the trains from the interchange track at Jamesville and place them on an interchange

track already in existence at the Solvay Company's plant in the village of Solvay, and by a similar counter movement to return the empty cars. All plant switching was to be performed, and has been performed, by the Solvay Company's locomotives. Actual transportation was apparently commenced in 1911. The rate of 15 cents per gross ton continued in effect, apparently without protest or dissatisfaction on either side, until 1918. In 1916 there was a general advance of 5 per cent in freight rates, but this was not applied to the traffic in question. In May, 1918, under Federal control, there was a further general advance of 15 per cent. This was applied to the traffic, and a new rate of 17 cents per gross ton was installed. General Order 28, of June 25, 1918, issued by the Director General of Railroads, increased rates 25 per cent. This increase, under the method employed of dealing with fractions, resulted in a rate of 40 cents per gross ton. The Solvay Company objected to this increase, and the rate was voluntarily reduced by the Director General to 30 cents per net ton, effective September 16, 1918. The Solvay Company complained to the Interstate Commerce Commission, which under Federal control had authority over intrastate rates. The examiner who heard the case recommended a rate not to exceed 21 cents per gross ton. Exceptions were filed, and on October 21, 1919 (I. C. C. Docket 10363), the Interstate Commerce Commission fixed a rate of 25 cents per gross ton, which has been in effect since February, 1920.

The prayer of the complaint is that the Commission fix a proper rate, and complainant contends not only that the proposed increase from 25 cents to 35 cents is unjust and unreasonable, but that 25 cents is also unreasonably high. Under section 29 of the Public Service Commissions Law, the burden of proof to justify any increase above 25 cents is upon the carrier. The 25 cents rate was fixed under Federal control by the Interstate Commerce Commission in the exercise of lawful authority, and the burden to show that it

is now unreasonable must rest upon the shipper. The evidence is voluminous and goes into great detail on some features of the case, but the conclusion reached renders it unnecessary to recite any great part of the evidence or to enter into tabulations of statistics. It is however necessary to summarize some of the facts in order to enlighten what is to follow.

The Solvay Company has expended in the development of its quarry at Jamesville, including quarry plant, tracks, and plant railroad equipment, something over a million dollars. It has invested in open-top steel cars \$66,350. Of these, forty-one are 50-ton cars and twenty are 75-ton cars. The railroad company has invested \$7500 in an interchange track at Jamesville besides double-tracking its line from Jamesville to the Syracuse city line. This double-tracking was completed in 1914 at a cost of about \$150,000. The division superintendent of the respondent stated that the limestone traffic was the principal reason for constructing the double-track. This is probable, but it is not thought that it was the only reason. This branch of the railroad is double-tracked from Binghamton to Chenango Forks, and from Cortland Junction to Apulia. The traffic is heavy enough to warrant a double-track line, and certainly the existence of the double-track greatly facilitates the movement of all traffic. Originally there was one train movement each way, in the night time. Some years ago this practice was changed. A yard engine now moves from Syracuse to Solvay about 4 a. m. and brings a train of empty cars from the interchange track to the Syracuse yard. A freight engine and crew regularly assigned to the traffic there take up the train and take it to Jamesville, arriving at 8:30 a. m. The cars are placed upon the interchange track, and about 9 o'clock the engine and crew pick up a train of loaded cars and take them to Solvay where they are placed on the interchange track at that point. The engine and crew pick up another train of empties leaving Solvay about 11 a. m. About

2:30 p. m. the second loaded train leaves Jamesville for Solvay, and the engine and crew return to the Syracuse yard, having completed their work, about 4 p. m. These movements occur every day, including Sundays and holidays. Each train consisted of from 10 to 25 cars, the lading averages 58 tons per car, and the number of cars 17 to a train.

While waiting at Jamesville the engine and crew do whatever general switching there is to be done at that point for the railroad. This consists chiefly in moving cars of limestone and empty cars to and from cement works at that point. About one hour and fifty minutes a day is the time so occupied. The quarry produces, besides the larger sizes of limestone used by the Solvay Company, "spawls" (smaller sizes such as are used for roadbuilding) and ground limestone. These are marketed commercially and shipped in carrier's equipment at regular rates usually borne by the purchaser. Such traffic moving toward Syracuse is moved in the same train as the Solvay limestone and dropped in the Syracuse yards.

The railroad contends that the present method was adopted for the purpose of specially expediting the traffic, but the complainant asserts that it was instituted by the railroad in order better to fit its general traffic conditions. There is an ascending grade from the Syracuse yards toward Solvay for about one mile, and about half the time a yard engine has to be used as a pusher in getting the loads up this grade. The track through Syracuse crosses a number of streets at grade, crosses the old Erie canal, and crosses at grade a track of the New York Central which was formerly a main line track of the Auburn branch but now seems to be used to reach certain industries.

The carrier, to justify the increase in rates, claims that the original rate of 15 cents a gross ton was low. This may be true, but it was in force from 1911 until 1918 without complaint by either party. While it was established by

tariffs regularly filed, it was fixed after extended negotiations between the parties. They were both entirely competent to look after their own interests. The rate was not forced upon either, and the testimony of a former officer of the road, who seems to have been chiefly instrumental in fixing the rate, is to the effect that it was throughout profitable to the railroad. When a general 5 per cent increase was authorized by the Interstate Commerce Commission in 1916 and intra-state rates adjusted to that increase, the respondent did not see fit to apply the increase to the rate in question. It is an inference so strong as to create a conclusive presumption that the rate was fair to both parties at its inception and remained a fair rate at least until 1917.

There is considerable evidence of other rates on limestone between other points. This same evidence was offered before the Interstate Commerce Commission which held that with a single exception there was no such similarity in circumstances as to entitle the comparisons to controlling weight. That is true as the case is presented to us. The exception is in the case of very similar loads hauled about the same distance from Oxford Furnace, N. J., to New Village, N. J.

It does not appear even in that case that there is any great similarity in the method of handling the traffic, and in that case the carrier furnishes and maintains the equipment. There, the rate before the 40 per cent increase was 30 cents per net ton. It may be that the New Jersey rates have been fixed with reference to the Solvay rates or *vice versa*. In either case, to adopt one as a test of the reasonableness of the other would be circuitous logic.

The respondent also appeals to the general rate advance made effective by the Interstate Commerce Commission in Ex Parte 74 as indicating generally increased costs. Ex Parte 74 was an emergency case, the Transportation Act, 1920, requiring immediate action. By the very necessity of the case matters were handled in gross, and everything in the so called eastern territory was treated on a common basis.

This Commission, in the Application of the Carriers (case No. 7698, Opinion No. 526), very carefully stated that its grant of special permission to make the increases effective intrastate did not indicate its approval or disapproval of the rates contained in the proposed tariffs. The Interstate Commerce Commission in Ex Parte 74 referred expressly to rates on sand, gravel, rock, and slag, and intimated that these rates might be disproportionate. It apparently withheld separate consideration only because "the carriers had indicated a willingness promptly to readjust rates in cases where hardship results from the general percentage increases". It then called the special attention of the carriers to these commodities "to the end that such action may be taken as the facts may seem to warrant".

Such evidence as we have as to the present or past cost of handling this particular traffic was furnished by the carrier at the request of the complainant, and the carrier has throughout the proceedings maintained that it is impossible to segregate the cost of handling this special business. The complainant insists that the rate should be fixed on the basis of such cost, but the evidence, while voluminous, is entirely insufficient to establish it.

Appeal is made to the operating statistics as late as the month of August, 1920, for the purpose of showing that the railroad as a whole is confronted with increased costs as compared with 1919, and inferably that its traffic as a whole is not yielding the results which it was sought to produce by Ex Parte 74. We can not see our way to apply on a percentage basis the operating results of an entire large railroad system to the movement of a single commodity over a few miles of the road.

Appeal is finally made on the ground of the value of the service to the shipper. It appears that of late the Solvay Company has been unable to obtain sufficient limestone from the Jamesville quarry and has therefore purchased the commodity at other points much more distant and paid

freight greatly in excess of the rate the railroad now seeks to impose. It is also true that others who use the commodity procure it at much greater cost for freight and perhaps for the commodity at the quarry, and that such higher cost is not prohibitive. It is entirely true that each individual rate can not be adjusted like, for instance, commercial lighting rates in a city, by a consideration of the value of the property used in the service, the cost of operation, and the fixing of a fair return. Such a process, if it were practicable to reach exact results thereby, would lead to rates on many low grade commodities beyond what the traffic would bear. It is of the primer of railroad rate making that low grade commodities can not bear their full share of the general burden, and therefore that certain high grade commodities must bear more than their share where the value of the service permits such adjustment. This, however, is very far from establishing a rule that the rate should be based on the value of the service to the shipper. Merely because the shipper enjoys a geographical or other advantage which would enable him to pay many times the existing rate and still earn a profit on his business, the carrier is not to be permitted to transfer that advantage to itself by exacting a rate disproportionate to the cost of the service and the accrual of a proper return in combination with all other traffic. This statement renders it unnecessary to discuss in detail certain contentions of the carrier, as, for instance, that under the method now pursued 61 cars serve the shipper's purposes while when the rate was established it was estimated that 100 cars would be required. This has proved an advantage to the shipper, but it does not appear that it has cost the carrier a dollar.

The principal reliance of the complainant in its insistence that the 15 cent rate should be restored is that that rate is still sufficient to more than cover costs and that it yields a return to the railroad per ton-mile about twice as great as the railroad receives from its entire freight traffic. It is not

established that the 15 cent rate would now cover the costs of the traffic. The evidence is too fragmentary to permit any such conclusion. No proper inference can be drawn from the statistics presented as to the return to the railroad per ton-mile on its entire freight business. The haul in question is 9 miles; the average haul of the railroad on all its freight has ranged from 171 miles in 1912 to 186 miles in 1919. The return per ton-mile is always very much greater on short hauls than on long. It appears from the evidence that it is often eight or nine times as much. To draw any inference from such comparisons we should need to have the return per ton-mile on corresponding hauls of similar commodities. Such evidence as we have on limestone rates indicates that the revenue is much greater in general than in the present case. The carrier has, except to a small extent, failed to establish its case for an increase. The shipper has altogether failed to establish its case for a reduction.

We have already stated that we must accept the 15 cent rate as having been a proper rate from the time of its inception until at least 1917. There is much evidence as to the special character of this traffic, the impediment it presents to other railroad traffic, due to its movement through the city of Syracuse and the Syracuse freight yards, and many other features of like character. These were all known when the 15 cent rate was installed and throughout its existence. The 15 cent rate was then sufficient to cover all these matters and forms the ultimate basis for the present determination. In October, 1919, the Interstate Commerce Commission fixed the rate at 25 cents a gross ton. This was after full hearing, and the conclusion embraced a consideration of increased costs down to that time. It is said that the evidence was completed prior to June, 1919, that the decision speaks from the time the evidence was taken, and that costs increased considerably thereafter. The examiner in June, 1919, recommended a rate of 21 cents.

The report of the Interstate Commerce Commission, after dealing exhaustively with the facts of the case, proceeds to fix the 25 cent rate in a single paragraph without stating why the examiner's recommendation was not adopted or without stating any rule by which the 25 cent rate was determined. As the order provided for making it effective on or before February 14, 1920, and as the rate was being fixed for the future, we infer that the Commission had in mind the then increasing costs and the prospect of their continuing for some period. We do not find in the record any evidence of changed circumstances since the proceeding referred to, except the general wage increase made by the Labor Board July 20, 1920. Under the estimates made by the Labor Board and the Interstate Commerce Commission such increase was equivalent to 12.2 per cent of the total operating revenue of the eastern carriers. Applying that percentage to this traffic, the rate of 25 cents per ton would be increased to 28 cents. That is to say, assuming that the total wage increase amounts to 12.2 per cent of the operating revenue derived from this traffic, a rate of 28 cents per gross ton would distribute this increase equitably as between this traffic and the general traffic of the road. But this assumption is not warranted. It does not follow that because the wage increases of May last were equivalent to 12.2 per cent of the revenues of all the railroads in the eastern group, they amounted to 12.2 per cent of the revenue of this railroad from this particular part of its business. The evidence establishes the contrary.

The revenue in 1920 to September 1st was \$112,867, indicating an annual revenue under the 25 cent rate of about \$170,000: 12.2 per cent of this would be \$20,740. Fortunately we are not without a basis for estimating the annual increase in wages allocable to the traffic in question. The wages of the regular crew prior to May were \$4.97 an hour; they are now \$5.93 an hour, an increase of 96 cents. A small fraction over ten hours a day is devoted to the traffic:

$10.06 \times .96 \times 365$ gives \$3525.90. This charges the entire expense to the Solvay traffic, though a considerable number of cars of spawls and ground limestone are handled by the same crew. The wages in connection with the use of the yard engine and pusher were increased from \$3.26 an hour to \$4.09 an hour, or 83 cents. About one hour a day is occupied: $365 \times .83$ gives \$302.95 for the yard engine. The pusher is used about 19 hours a month: $19 \times .83$ gives \$15.77 a month, or \$189.24 a year, for the pusher. These are the only items that can be estimated with any degree of exactness.

The carrier estimates that the cost of track maintenance has increased since 1919 \$300 a month. This includes the cost of both labor and materials. Assuming that it is all labor, and also accepting the only possible apportionments obtainable from the evidence, although these are far from satisfactory, and charging 75 per cent of maintenance of way to the freight traffic, and 6 per cent of that to this particular traffic; further, treating the \$300 a mile as applying to sidetracks as well as main tracks, we have \$4500 as the total increase for the fifteen miles of track involved: 6 per cent of 75 per cent of this amount is \$202.50.

The company claims that the labor expense of protecting the grade crossings has increased from \$29,000 in 1918 to \$54,000 in 1920. This is an increase of \$25,000 a year, and 6 per cent of 75 per cent of this amount is \$1125. The wage increases affected also the maintenance cost of the engines used and general expenses, a part of which of course ought to be allocated to this traffic. Other wage elements are also involved but they are too small to be considerable. For engine maintenance and general expense we are left by the evidence without any substantial basis for an estimate. The items above given aggregate \$5345.59. Let us assume that the unknown items would raise this to \$6000. This seems liberal. Based on the experience of the first eight months, the traffic for 1920 should amount to about 635,000

tons. The increased wages should therefore result in a rate increase of 1 cent a gross ton, or a rate of 26 cents a gross ton.

The carrier submits figures showing that its total increase in operating costs since 1918 has on its entire freight business amounted to \$0.0056 a ton-mile. This is very close to 5 cents a ton for the nine-mile haul of this limestone. We have seen that the Interstate Commerce Commission allowed for 1920 an increase of 4 cents a ton above that recommended by the examiner on evidence taken early in the year and doubtless based on 1918 figures. We add to this 1 cent a ton, so that the total increase over what the rate apparently should have been at the beginning of 1919 is the 5 cents a ton resulting from the carrier's own figures of the general increases in its freight costs during the corresponding period.

All concur.

No. 570 : 803

Joint Petition of THE WESTCHESTER STREET RAILROAD COMPANY and LEVERETT S. MILLER AS RECEIVER OF THE WESTCHESTER STREET RAILROAD COMPANY under section 184, Railroad Law, for approval of a declaration of abandonment of portions of the constructed route of said company's railroad. [Case No. 7792.]

Where an application for the abandonment of a line of a street surface railroad is presented to the Commission for its approval, and it appears that the operation of the line is important for public convenience, and that perhaps sufficient revenue may be obtained to cover necessary operating expenses by increasing rates of fare and changing the boundaries of zones, these remedies will be applied, and the application disapproved.

Where the traffic on a line will not bear a rate of fare sufficient to cover operating expenses, a certificate of abandonment as to such line will be approved.

Overlapping zones should be established where the local conditions indicate the propriety thereof.

Decided December 21, 1920.

Appearances:

Graham, McMahon, Buell & Knox (by Mr. Buell), 42 Broadway, New York city, and *Eugene F. McKinley*, White Plains, for the applicants.

William R. Condit, Corporation Counsel, for the City of White Plains.

Ralph A. Gamble, 366 Madison avenue, New York city, for the Town of Mamaroneck.

J. Henry Esser, 9 South Third avenue, Mount Vernon, of counsel, for the Town of Mamaroneck.

E. R. Eckley, 2 Rector street, New York city, as attorney for the Village of Mamaroneck.

Charles B. Young, Harrison, member of the Town Board, representing the Town of Harrison.

W. E. Lyons, jr., 286 East Boston Road, Mamaroneck, in person.

Clarence DeWitt Rogers, by written protest, for the Village of Larchmont.

KELLOGG, Commissioner:

In this case we continue our study of the troubles of the receiver of The Westchester Street Railroad Company in his attempt to operate the various lines of that corporation, a situation which has of late been frequently and almost constantly before us for consideration. Attempts have been made in various forms to stimulate the revenues so as to at least reach an amount sufficient to cover operating expenses during the pendency of the receivership.

In case No. 6772, decided March 26, 1919, a zoning system was placed in operation covering the various lines of this railroad. In case No. 7547, the order in which was entered June 24, 1920, a rearrangement of the zoning system was established, and increased fares in certain zones were permitted.

In this case, the receiver comes before us presenting a declaration of abandonment applicable to two of the lines in his custody, namely the so called Westchester Avenue line in White Plains, and the Mamaroneck line.

The declaration of abandonment has been duly adopted by the directors of the corporation, and has been ratified and adopted by the sole stockholder thereof, The New York, New Haven and Hartford Railroad Company. This declaration of abandonment has been joined in by the receiver, and is now presented to this Commission for its approval.

It covers two separate and distinct lines. One of these lines sought to be abandoned is the so called Westchester Avenue line. It is entirely within the city of White Plains. Its length is 1.57 miles, extending easterly from the so called Silver Lake line at North Broadway and Railroad avenue, and connects with no other line or railroad.

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This line for the month of September, 1920, showed an actual operating loss of \$576.11. The entire loss on that line for nine months of the current year prior to October 1st aggregated \$6039.84. This did not include taxes, allowance for depreciation, or allowance for liability for accidents. The entire operating revenue for the nine months was \$5532.62. The operating expenses were \$11,572.46.

To this must be added a proper share of the taxes, a reasonable allowance for depreciation, and some allowance for liability for accidents. Even without any of these additional allowances, the operating expenses exceeded the operating revenue by nearly 100 per cent. As has been stated, the line is a short one, about $1\frac{1}{2}$ miles in length. The fare collected thereover has been five cents.

It is quite apparent from the foregoing figures, considering the smallness of the revenue, the cost of operation, and the shortness of the line, that the traffic will not bear any rate of fare sufficient to pay the operating expenses. The situation seems to be hopeless, and the line can very properly be abandoned.

The approval of this Commission to the proposed certificate of abandonment, so far as it relates to this line, should be extended.

As to the so called Mamaroneck line, however, a different situation presents itself. This line extends southerly along Mamaroneck avenue in the village of White Plains, through the town of Harrison and the village and town of Mamaroneck, to Chatsworth avenue at Larchmont. It is approximately $8\frac{1}{2}$ miles in length.

In our order of June 24, 1920, this line was divided into five zones, and a five cent fare was provided in each zone. The division of the zones having our approval at that time was somewhat hampered by the insistence of some of the local authorities upon certain fare restrictions contained in the franchises granted to the predecessors in interest of this railroad company. This attitude resulted in the necessity

of so forming the zones that not more than one fare of five cents could be collected in any of these municipalities. In the village of Mamaroneck this resulted in the establishment of a zone approximately 2.65 miles in length; the remaining zone, extending from that village to Chatsworth avenue, was only .75 mile in length.

It became apparent at the hearing, and to all interested, from the evidence submitted, that unless these fare restrictions were waived, operations of this line could not continue, and the abandonment proposed would be the only course to pursue. However, during the pendency of the proceeding, realizing the situation, these various municipalities, namely the Village of Mamaroneck, the Town of Mamaroneck, and the Town of Harrison, waived the franchise restrictions for a period of two years.

The City of White Plains, which had as to all of the lines of this railroad waived its fare limitations until March 11, 1921, also adopted resolutions intended to be applicable to this Mamaroneck line only, waiving the restrictions for a two-year period.

All other municipalities along the various lines of the railroad having previously waived their franchise restrictions, the order permitting the collection of fares on the zoning system as provided by the order of June 24, 1920, has been extended by various superseding orders so that the time has now been extended to March 11, 1921, by the last extension order granted December 9, 1920.

With the waiver of these franchise limitations, permitting an unrestricted zoning system and the establishment of a reasonable rate of fare, sufficient if possible to cover the cost of operations if the traffic will bear it, a new situation arises.

That public convenience and a necessity requires the operation of this line is quite apparent from the most casual consideration of the evidence.

This connection between the county seat of Westchester

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county and one of its most populous villages, with communities in their vicinity lying so near the rapidly expanding metropolitan city, with its constantly and rapidly increasing and extending suburban population, must if possible be maintained. It would indeed be unfortunate if this line be abandoned and the village of Mamaroneck deprived of its only direct means of access to the county seat, and also of the only street railroad traversing its principal thoroughfare.

Upon the hearing, all parties seemed to be impressed with the importance of saving this line if possible. It is quite apparent that under the present fare conditions it can not be operated.

During the month of September, 1920,

The operating revenue was.....	\$4,628.51
Its operating expenses were.....	5,579.96
Showing a deficit in operation of.....	\$951.45

The expenses for the first nine months of the current year on this line were as follows:

Operating revenue	\$40,472.15
Operating expenses	52,506.59
Showing a net loss from operation of.....	\$12,034.44

As in the previous reference to the Westchester Avenue line, this computation includes no charges for taxes, no allowance for the necessarily accruing depreciation, and no allowance for liability for accidents, or for any fund that should be created therefor. All of these charges must be considered in making any estimate of the amount of funds needed to cover the expenses of operation, as they are all properly included in and must be met as operating expenses before any balance is available for payment of interest or return upon the capital invested.

This shows that a very substantial increase in revenue must be secured. And it is to be hoped that further experimentation, now without the handicap of franchise restrictions, may result in a revenue sufficient to keep the cars on this road in motion.

At the outset of any consideration of the question it is quite apparent that there has been a very large diminution of riding by the curtailment of the schedule of operations. Where formerly cars were operated on twenty-minute headway, that headway has been extended to forty minutes, and at certain times to one hour. The result is that the distance between cars is so great, prospective passengers become discouraged in waiting for a next car, and not being accurately informed as to the timetable at all times of the day, and not being sure of a strict compliance with the schedule of operations as attempted, have given up to a large extent wherever possible riding on this line. Thus its receipts have been decidedly curtailed.

The first essential step is the promulgation and adherence to a schedule of such reasonable frequency that people can without too much delay await the arrival of the next car, and not be compelled to wait so long that other means of conveyance or pedestrianism becomes preferable.

An examination of the route was made by a committee representing the various interested parties, and headed by Ray G. Winans, chief inspector of the division of electric railroads of this Commission, and it was ascertained that a schedule of twenty-minute headway over the entire line could be obtained by the operation of five cars. Such frequency of operation should be continuous from 6:30 a. m. to 6 p. m. This service is essential to the successful operation of the road. During such remaining hours of the day as service should be rendered, the cars should run with sufficient frequency properly to accommodate the travel. Determination as to the frequency of the service during such remaining hours can be left to the receiver or the operating officials of the road for the present at least.

It should perhaps be noted that the receiver is somewhat pessimistic in regard to the entire attempt to keep the road open, and the friction which has resulted from the differences in opinion which has arisen between the local authorities

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and the receiver, over certain important matters in issue, has not added to the ease of the solution of the problem with which we are confronted. There is some indication, however, that this relationship is becoming more cordial, and it is to be hoped that all parties will coöperate in a last final attempt to save this line.

In order to obtain the best results, there should be a re-zoning so as to more nearly equalize the lengths of the zones established and a closer uniformity of fare. The parties are generally in accord as to the proper zones to be provided if the road is to continue to operate.

It is thought that the following will prove the most practical division:

Zone 1: From the New York Central Station in White Plains to the center of Bloomingdale switch, approximately	1.5 miles
Zone 2: From the center of Bloomingdale switch to the center of Rosedale switch, approximately.....	1.9 miles
Zone 3: From the center of Rosedale switch to the northerly line of the village of Mamaroneck, approximately.....	1.75 miles
Zone 4: From the northerly line of the village of Mamaroneck to the Bandstand, approximately.....	1.71 miles
Zone 5: From the Bandstand to Chatsworth avenue at Larchmont, approximately	1.7 miles

It is conceded that the fare in the first zone should not be increased from the present five cent rate in the city of White Plains, with the same transfer privileges as at present exist. The receiver, however, claims that the fare in the other zones should be placed at eight cents. It is suggested on behalf of the municipalities that five cents will be sufficient and that riding will be stimulated by the lower fare.

I have carefully considered the well ordered argument presented in this behalf, and it is well to say in passing that the case of the municipalities has in this proceeding been presented with much ability, and with an apparent spirit of fairness and desire to coöperate with the receiver. I can not find, however, from any of the figures submitted that a five cent fare in each zone can very materially add to the revenue, certainly not nearly sufficient to cover operating expenses.

Such a rate would add nothing to the fares already charged for through trips, for which there is now collected twenty-five cents for five zones. Neither can there be sufficient added revenue from an increase in fare in Zones 2 and 3 from five to eight cents, leaving the other zones at five cents. There is no way of computing any sufficient revenue to cover operating expenses, including taxes, depreciation, and accident fund, from such a limited increase.

The evidence submitted shows that on a basis of twenty-minute service, an average fare per zone should be .0695, to cover operating expenses, exclusive of taxes, depreciation, and accident liability.

In the statement of operating expenses allocated to this line, the cost on a car-mile basis applicable to the entire road is somewhat high because no sufficient allowance is made for diminished cost of operations on this line by reason of the use of the one-man car.

But as has been stated, the figures given do not include anything for depreciation, or for taxes or liability for accidents, and it is apparent there must be a very substantial increase in the estimated need of .0695 per zone after all due allowance is made for saving in cost of operation due to the use of lighter equipment. It is not only difficult but impossible to foretell the future as to the amount any rate of fare may produce. We can only use our best judgment in the matter, and let the future decide the result.

As has already been indicated, the order made in the preceding case permitted an increase of fares on other lines of the system expiring March 11th next. The order which is to be made in this case should have the same limitation, so that the matters can be handled together.

In the meantime we have the winter season with its heavy expenses of operation, and when the expiration date draws near, it may be proper that different provision should be made in view of the actual experience, although somewhat

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limited, which will at that time be an added guide to our action.

From the figures submitted, from the situation of the line, and from all other matters which have been placed in evidence, it appears as a most reasonable conclusion that aside from the first zone, where a rate of fare of five cents is conceded to be proper, a fare of eight cents should be permitted in the other zones.

To this, however, there is a modification. The citizens of Mamaroneck request an overlapping of zones between the railroad station and the bandstand, so that in this area passengers may be transported in either direction to and from the territory of Zone 4 or Zone 5 without additional fare. This is a distance of about two thousand feet, in the heart of the business center of Mamaroneck. Under ordinary conditions it would seem that the citizens should be allowed to go to and return from any part of the village from the business center for a single fare. This is the ordinary custom which maintains usually in other municipalities. It would be unusual indeed to make a zonal boundary so near the business portion of the village without operating an overlap.

The attorneys for the receiver, however, have seen fit to oppose this suggested overlapping of zones. The objection is placed on three grounds —

First: It introduces complications into the schedule and the collection of fares where operations are conducted by means of the one-man car.

Second: It will deprive the receiver of needed revenue.

Third: It prevents an adequate record being kept of the performance in the different zones.

The first and third objections are not sufficient to overcome the manifest justice of establishing an overlapping zone in this instance. It would apparently be most improper to require payment of sixteen cents by a person desiring to go from any part of the village of Mamaroneck to the business

center, when the entire line through the village is only 2.62 miles in length, and all parts of the village are well within two miles of that center.

As to the suggestion that it will deprive the receiver of additional revenue, it would seem that the contrary would result. Rather than pay this very heavy charge, it is probable that parties would walk to the boundary line, and having walked that distance, unless a car was immediately available, would probably continue to their destination. It would seem that from the establishment of overlapping zones the revenue would be increased rather than diminished.

These overlapping zones are in operation throughout the State. They are frequently and successfully in operation on other lines. They are in effective force and successful operation on the New York and Stamford Railroad, owned by the same stockholding interest as the Westchester Street Railroad.

The propriety of this overlapping of zones further was recognized by the receiver in his original petition in case No. 7547, where Zone 3 was proposed to extend "between the Harrison and Mamaroneck village line, and the Bandstand in the village of Mamaroneck". And Zone 4 was provided to extend "between the N. Y., N. H. and H. Railroad station, Mamaroneck, and the end of the line at Chatsworth avenue in the village of Larchmont". Following this, the petition contains the following note: "(This zone overlaps Zone No. 3 between the N. Y., N. H. and H. Railroad station and the Bandstand in the village of Mamaroneck)."

On account of the refusal of the Village of Mamaroneck at that time to waive its franchise rights, this proposed zoning was abandoned. But the petition from the receiver adds somewhat to the manifest propriety of making provision along the lines suggested by his original petition in the former case.

The order to be entered herein should therefore provide for the zone as above indicated with the overlapping requested by the village authorities.

It is also stated in the evidence that at a public meeting held by the citizens of the village and town of Mamaroneck on December 10, 1920, it was proposed that books of tickets for school children, providing for a five cent fare to any school in any portion of the town or village, should be issued. This matter was not sufficiently discussed upon the hearing, nor sufficient evidence in relation thereto taken to justify a formal order in regard thereto at this time. The question of a reduced rate for school children in some form has much of merit. It is frequently and perhaps usually, in effect on street railroads in the State. Such a reduction is in effect on the New York and Stamford Railroad.

While no formal provision in regard to this matter will be embodied in this order, consideration of it is recommended to the receiver with the request that he take such action thereon as would seem proper. It is quite possible that this usual custom could be applied to this railroad and result in an enhancement of the revenues. Unless it would result in a manifest depletion, some reduction of fare for this service, which is in the nature of a commutation service, should be put into effect. The matter at present will be left to the receiver, with the request that he give it careful consideration and act accordingly.

The order to be made in this case should therefore provide for—

1. Approval of the abandonment of the Westchester Avenue line.
2. Disapproval of the abandonment of the Mamaroneck line.
3. The operation of cars on the Mamaroneck Avenue line under a twenty-minute headway from 6:30 a. m. to 6 p. m., and during other hours with such frequency as the proper requirements of the service demand.

4. Re-zoning of the Mamaroneck line as indicated, and provide for an eight cent fare in each of the zones except Zone 1, with overlapping privilege between the bandstand and the New York, New Haven and Hartford Railroad station in the village of Mamaroneck, effective until March 11, 1921.

All concur.

No. 571 : 815

In the Matter of the Complaint of ALFRED C. DAVIS AND OTHERS of Jamestown under section 71, Public Service Commissions Law, *against* PENNSYLVANIA GAS COMPANY as to price of natural gas charged private consumers. [Case No. 6040.]

Where in addition to securing an adequate return upon its investment, a natural gas company has accumulated a reserve fund to make good the depletion of its fixed capital due to consumption in operation, it is not entitled to a return upon such fund in addition to a return on the capital to make good the depletion of which it was created.

So far as such fund is invested in the fixed capital of the company, it should be deducted from the rate base.

The same principle applies where such fund once assembled is diverted from the purpose for which it was created and arbitrarily added to corporate surplus.

The first step in an inverted block, or sliding scale upward, rate for natural gas should be enough to cover the absolute needs of domestic consumers during months of greatest consumption, in this case 10,000 cubic feet per month.

Decided December 23, 1920.

Appearances:

Messrs. Thrasher & Clapp for complainants.

Messrs. Marion H. Fisher and John E. Mullin for defendant company.

BARHITE, Commissioners:

This proceeding is brought against the Pennsylvania Gas Company, and is based upon the complaint of a number of the citizens of the city of Jamestown who protest against an increase in the price of natural gas from 32 cents per thousand cubic feet to 37 cents per thousand cubic feet, with a discount in each case of 2 cents per thousand cubic feet if the bills are paid before a certain date.

A large amount of time has been taken in this controversy by reason of the contention of the gas company that it is a Pennsylvania corporation, that all of its gas is obtained from wells in that State, and that the gas used in Jamestown is brought in pipes over the state line which constitutes an act of interstate commerce over which this Commission has no jurisdiction. After the Commission had denied the contention of the company, the matter was carried through the various courts of the State to the Court of Appeals, and thence to the Supreme Court of the United States, that court sustained this Commission in its claim to jurisdiction; and the case was ready for a hearing upon the merits, although further and unusual delay was occasioned by the fact that the defendant company, after it had sued out a writ of error to the Supreme Court of the United States, made application to the Appellate Division of the Supreme Court of the State of New York for a stay of proceedings pending the review by the court of last resort.

The Pennsylvania Gas Company was incorporated under the laws of the State of Pennsylvania on July 8, 1881, under the name of the Warren Light and Heat Company, for the purpose of supplying light and heat to the inhabitants of the borough of Warren and its vicinity, in Warren county, Pennsylvania. The present name was adopted on October 27, 1885.

At various times the company purchased the properties and franchises of other Pennsylvania companies which had been incorporated for the purpose of supplying light and heat to various communities in that State. In 1885 the properties and franchises of several New York companies were purchased. All of these various companies appear to have been merged with the Pennsylvania Gas Company. At the time of its incorporation the authorized capital stock of the company was \$10,000, which was increased from time to time until it amounted to \$2,000,000. The par value of the shares was \$25. In 1893 and subsequent thereto the stock-

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holders, upon the recommendation of the board of directors, reduced the capital stock to \$1,600,000, by purchasing at par 11,600 shares, and 4400 shares at \$40 per share, an amount equal to 160 per cent of par. At a still later period, at the request of the stockholders, the capital stock was reduced from \$1,600,000 to \$800,000, each stockholder surrendering one-half of the number of shares held by him and receiving in exchange for each share a one hundred dollar debenture bond payable in twenty years with interest at the rate of 6 per cent. These bonds were paid off during the next ten years.

By the purchases noted the company purchased and retired 48,000 shares of the par value of \$1,200,000, for which the company paid to stockholders \$3,666,000, or \$2,466,000 more than par value. In addition, the company paid \$881,000 interest on the debenture bonds issued in payment of stock.

In 1911 the capital stock was increased from \$800,000 to \$4,800,000, and the amount of the increase was issued to the stockholders as a stock dividend.

In 1916 the capital stock was increased from \$4,800,000 to \$7,200,000, and the amount of the increase paid to the stockholders as a stock dividend.

Only one instance appears in which the stockholders have been asked to pay anything into the treasury for the benefit of the company. In 1885 an assessment of 75 cents per share was levied on the capital stock. This assessment, amounting to \$9000, was credited to "Property and franchise account".

The annual reports of the company filed with this Commission from the year 1913 to the year 1919, both inclusive, show that a dividend of 10 per cent per year has been paid. These dividends are exclusive of a stock dividend of 50 per cent paid in 1916, to which reference has heretofore been made.

The foregoing general statements show that the company has been and is in a very prosperous condition, and attention is called to them because the complainants and the company

differ as to the theory upon which this case must be decided: the complainants urging that the Commission must consider the entire business of the company both in Pennsylvania and New York, while the company insists that the Commission is limited in its investigations as to a proper rate for New York state, to that portion of the business conducted in New York.

It must be conceded that this Commission, as one of the departments of the government of the State of New York, has no control or authority over the business of the Pennsylvania Gas Company in the State of Pennsylvania and conducted under the laws of that State. But whether this Commission may not make an examination of the business conducted in and the property owned by the company within the foreign state is a different question.

There are authorities which may be cited upon the point under review. In the case of *Smyth v. Ames*, 169 U. S. 466, the question arose as to whether a statute of the State of Nebraska which fixed the rates to be charged for the transportation of freight from any point in the State to any other point in the State was constitutional. In other words, whether the amounts fixed under the terms of the statute were reasonable in amount. The controversy arose over interstate railroads and roads controlled by them whose business was not confined exclusively to the State of Nebraska. As here, the question arose whether the reasonableness of the rates established by the Nebraska statute was to be determined by the result upon the rates alone affected by it, or whether the entire business of the company was to be taken into consideration. Upon this question the court says —

“It is further said in behalf of the appellants, that the reasonableness of the rates established by the Nebraska statute is not to be determined by the inquiry whether such rates would leave a reasonable net profit from the local business affected thereby, but that the court should take into consideration, among other things, the whole business of the company, that is, all its business, passenger and freight, interstate and domestic. If it be found upon investigation that the

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profits derived by a railroad company from its interstate business alone are sufficient to cover operating expenses on its entire line, and also to meet interest, and justify a liberal dividend upon its stock, may the legislature prescribe rates for domestic business that would bring no reward and be less than the services rendered are reasonably worth? Or must the rates for such transportation as begins and ends in the State be established with reference solely to the amount of business done by the carrier wholly within such State, to the cost of doing such local business, and to the fair value of the property used in conducting it, without taking into consideration the amount and cost of its interstate business, and the value of the property employed in it? If we do not misapprehend counsel, their argument leads to the conclusion that the State of Nebraska could legally require local freight business to be conducted even at an actual loss, if the company earned on its interstate business enough to give it just compensation in respect of its entire line and all its business, interstate and domestic. We can not concur in this view. In our judgment, it must be held that the reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The State can not justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the State has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the State that the State can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety, that its income goes into, and its expenses are provided for out of a common fund, and that its capitalization is on its entire line within and without the State, can have no application where the State is without authority over rates on the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business."

In *San Diego Sand Company v. National City*, 174 U. S. 739, the question arose over water rates, and the court says:

"One of the points in dispute involves the question whether the losses to the appellant arising from the distribution of water to consumers *outside of the city* are to be considered in fixing the rates for consumers within the city. In our judgment the circuit court properly held that the defendant city was not required to adjust rates for water furnished to it and to its inhabitants so as to compensate the plaintiff for any such losses. This is so clear that we deem it unnecessary to do more than to state the conclusion reached by us on this point."

In the matter of the *Pennsylvania Gas Company v. Public Service Commission*, 225 N. Y. 397, while the only question before the court was the jurisdiction of this Commission to determine a proper rate for natural gas in the city of Jamestown, the reasoning of the Court of Appeals in deciding in favor of such jurisdiction is in harmony with the conclusions of the Supreme Court of the United States in the cases cited. The Court of Appeals holds that the Pennsylvania Gas Company is engaged in interstate commerce, but that the State of New York is authorized to fix rates within its borders. The basis of this decision is the principle laid down in the *Minnesota Rate Cases*, 230 U. S. 352, at page 399, to the effect that as to these subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act. As an extension of the same idea the court says: "It is idle to speak of the need of uniformity of action by states of equal competence when there is only one state whose action is involved. But even within the state diversity rather than uniformity is exacted by the condition of the business. Rates adequate in one city are inadequate in another. The local needs are best known to local agencies of government. No central authority, acting for the nation as a whole, will readily discern them."

An examination of the New York State statutes controlling the subject of rates charged by a gas company and the power of the Commission over such rates shows nothing out of harmony with the views expressed in the cases to which attention has been called. Section 65 of the Public Service Commissions Law provides that the charge made or demanded by any gas corporation shall be just and reasonable. The Commission is given power, section 66, subdivision 5, Public Service Commissions Law, whenever it deems the rates or charges of any gas corporation are unjust or unreasonable, to determine the just and reasonable rates.

Under the decisions and the statutes quoted, it would seem to be necessary that the Commission in determining the proper rates for gas in Jamestown should not base its decision upon the entire property and business of the company both in Pennsylvania and New York, but should limit its investigations to the property in New York and to the income and the expenses of the business in that State, and the value of such a percentage of the company's property in Pennsylvania as may be used to supply gas to New York. Such would seem to be the rule of reason. The laws of the State of New York only have effect and control within its own borders. The operations of the gas company within the State which gives it being are not the subject of control or criticism here. It must be presumed that it has acted within its legal rights, and if it has not the error must be corrected within the State and by the State where the error was made. It is only when a foreign corporation extends its operations within the State of New York that it must yield to the laws and decisions of the courts of that State so far as its New York operations are concerned.

The Pennsylvania Gas Company is engaged in interstate commerce, and the Supreme Court of the United States has permitted this Commission to exercise its jurisdiction over the matter of rates within the State because Congress has not acted in the matter and regulation by state authority is

needed "to protect or regulate matters of local interest". It may be that the company has made huge profits in the past, yet this Commission has not been furnished with any data from which it may be determined what proportion of those profits was the result of the New York business. The company first obtained permission from the City [then the village] of Jamestown to supply gas to the inhabitants in November, 1885. There is some evidence showing the percentage of the business conducted in New York state at the present time, but no evidence of the percentage which the New York business sustained to the whole from time to time in the years that are past and gone is before us. Even if it were proper for this Commission to consider the profits of the past, it necessarily follows that any decision based upon the evidence in the case on the point in question would necessarily be more in the nature of a guess than a conclusion based upon proven or admitted facts.

Although it may appear that the past profits of the company have been reinvested and have become part of the capital of the company, that fact is of no significance. It is as legitimate to increase the business and the resources of a company by using the profits for that purpose as it is to divide those profits among the stockholders. Rates must be based upon the actual value of the property used in the business, and it is immaterial whether that property was acquired by selling new stock, out of income, or otherwise. (*Board of Trade v. Mountain Home Telephone Co.*, P. U. R. 1916-C 688-696.)

In the *Minnesota Rate Cases*, 230 U. S. 352, at page 454, it is said: "It is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment. If that has been reckless or improvident, losses may be sustained which the community does not underwrite. As the company may not be protected in its actual investment, if the value of its property be plainly less, so the

making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost."

The company has strongly urged upon the Commission that the dollar of today has greatly depreciated in value from its worth a few years ago, and that this fact should be taken into consideration in fixing the return to which the company is entitled upon its investment. It is true that the purchasing power of the dollar has largely diminished within a comparatively short time, and as a general principle such decrease in value may very properly be taken as one of the elements to be weighed in fixing the proper amount of return. The Supreme Court of the United States quite recently, in *Lincoln Gas & E. L. Co. v. Lincoln*, 250 U. S. 256, has called attention to the fact that a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or the future; but the law of the State of New York, Public Service Commissions Law, section 72, provides that in determining the price to be charged for gas or electricity "the Commission may consider all facts which in its judgment have any bearing upon a proper determination of the question . . . with due regard among other things to a reasonable average return upon capital actually expended". In view of the privilege given by the Legislature to this Commission to consider all facts which to it have any bearing upon the question of rates, the loss in buying power of the dollar should not be considered in this case. It appears from the record that the Pennsylvania Gas Company has had a very prosperous career; its assets have increased in value from a few thousands to millions of dollars, and this increase has arisen not from money put into the business but from the reinvestment of profits; in addition, large stock dividends have been declared. It appears from the annual reports, that as hereinbefore noted, a dividend of 10 per cent has been paid from 1913 to 1919, both inclusive, with a stock dividend during that period of 50 per cent; the present high prices are, as

every student of affairs must believe, of a temporary nature: already there are indications that they will soon fall below their present unwarranted level; in fact they must fall or business conditions will become intolerable. In view of the history of the company and the apparent temporary level of present prices, the present comparative depreciated value of money should not be considered.

The following are the figures which must control in the decision of this case:

<i>I. Computation of Investment in New York State</i>		
Sales of gas, 1919, as reported in New York state:	<i>M cu.ft.</i>	<i>M cu.ft.</i>
Jamestown	1,428,905	
Falconer	78,189	
Ellicott	24,858	
Outside of New York state.....		1,526,447
		4,159,369
		5,685,816
Ratio of New York sales to total sales.....	1,526,447	= .268
	5,685,816	
Appraisal of gas property, Exhibit No. 1:		<i>Dollars</i>
Jamestown main line.....		417,428
Jamestown city plant.....		984,196
Total present value Jamestown property, direct labor and material items		1,401,624
Overheads and intangibles, 20 per cent of labor and material cost		208,325
Materials and supplies.....		15,245
Working cash capital.....		95,843
		1,721,037
26.8 per cent of value of Pennsylvania gas fields, Exhibit No. 1		2,174,834
		3,895,921
Less 26.8 per cent of total accrued amortization reserve (company's annual reports).....		2,648,522
Rate base for New York state.....		1,252,399
<i>II. Return on Investment and Average Price of Gas.</i>		
Estimated New York State operating expenses, 1920.....		219,380
New York State proportion of \$302,201, average annual amortization charge		80,990
Taxes chargeable to New York state, excluding income and excess profits tax.....		53,787
		354,163
8 per cent on \$1,252,399.....		100,191
Total revenue necessary for 8 per cent return.....		454,354
Revenue from miscellaneous investments, 26.8 per cent of whole		12,974
		441,380

In the foregoing schedule the total value of the gas properties of the company is fixed at \$8,115,238. This figure is taken from the company's books as given to an examiner and accountant in the employ of the Commission by the engineer of the company on February 26, 1920. It is true that the valuation of these properties by expert witnesses called by the company is much higher than the value on the company's books. But we may fairly assume that the company for its own purposes has placed what it deems a fair value upon its own books, and unless some explanation is made and some valid reason is given why the estimate made by the company is not correct, such valuation is more satisfactory and less liable to suspicion than the testimony of witnesses selected by and called to prove the case of the company. The Supreme Court of the United States in *Knoxville v. Water Co.*, 212 U. S. 1, at page 18, when commenting upon evidence of the character to which reference is made, says, "And the conclusion of the court below rested upon that most unsatisfactory evidence, the testimony of expert witnesses employed by the parties".

The total present value of the Jamestown property, that is to say, the items of direct labor and materials, is obtained from the same source and should be accepted. No evidence has been offered in contradiction of these values, and to name any other figure is to rest a decision upon arbitrary values without any proof in support. It is true that the courts look with disfavor upon values resting solely upon reproduction costs, but the Commission has no other evidence upon which it can safely rely. The original costs were not submitted in evidence, and if they had been the rule remains that the company is entitled to a return upon the present value of the property.

In *Willcox v. Consolidated Gas Co.*, 212 U. S. 1, at page 52, the court says, "And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If

the property, which legally enters into the consideration of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase. That is at any rate the general rule. We do not say there may not possibly be an exception to it, where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public." This case does not come within the possible exception noted by the learned court. Allowing the values at the figures named in the foregoing schedule does not make an unjust rate for the public.

It will be noticed that in the foregoing figures no allowance has been made for the amortization of the wearing value of the plant measured by the estimated probable life of the gas supply, nor for "going [concern] value". Ordinarily, in determining the rate to which a natural gas company is entitled, this element should be considered. But it is equally true that no company is entitled to receive this item twice. When the customers have once paid, they must not be required to pay again. The company was first authorized to do business in Jamestown in November, 1885. From and including 1886 to and including the year 1919, the company has paid in the aggregate \$9,233,883.33 in cash dividends, or an average of 10.90 per cent per year. In addition, during the same period of time stock dividends amounting to 550 per cent upon the outstanding stock has been issued. The above figures do not take into account an instance where the capital stock was reduced and the stockholders received much more than par for their surrendered holdings. It is quite evident from the record of the company in evidence that these various amounts were paid from earnings of the company and not from borrowed money.

In *re United Fuel Gas Company*, P. U. R. 1918-C, pages 193-223, the West Virginia Public Service Commission, in speaking of "going value," says, "Going value is not always allowed as an addition to investment. We are not prepared

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to say that, in every case, an allowance should be made for this purpose. Certainly in a case where no losses are shown, where there is no deficiency in early earnings, or when it is shown that such losses, if any, were occasioned by gross mismanagement or extravagance, then no allowance should be made to cover this element."

In *People ex rel. Kings Co. L. Co. v. Willcox*, 210 N. Y. 479-489, Judge Miller, in speaking for the court upon the subject of "going value," says, "The first question, therefore, to determine on this branch of the case, was whether the company had already received a fair return on its investment. If it had received such return from the start, or if in later years received more than a fair return, the public would already have borne the expense of establishing the business in whole or in part, and to that extent the question of 'going value' for the purpose of fixing a present rate would be eliminated; for it must be constantly kept in mind in dealing with this problem that the company is entitled to a fair return and no more."

The total gas sold in New York during the year from September 1, 1919, to September 1, 1920, was 1,540,221 M cubic feet, and the amount received therefor was \$682,471.40. Of this amount, only \$823.83 was the extra amount paid over the discount rate, or a trifle over one-tenth of one per cent. Out of the total amount of gas used, Jamestown domestic and commercial customers used 1,350,490 M cubic feet, or practically 88 per cent of the whole amount. Of these customers, practically 42 per cent of the whole amount is paid for gas in the 37-cent block; 24 per cent for gas in the 47-cent block; 13 per cent in the 52-cent block; and 21 per cent in the 57-cent block. The blocks named are too small. From the experience of the Commission as to the amount of gas used, 5000 cubic feet per month is a small amount to be used. A rate of 32 cents for the first 10,000 cubic feet; of 37 cents for the next 5000 cubic feet; and a rate of 42 cents for all over 15,000 cubic feet, with the

present discount of 2 cents per thousand cubic feet for prompt payment, based on the business for one year ended August 31, 1920, will give the company in the future the income to which it is entitled, with a reasonable amount for leakage, contingencies, or a possible falling off in business; will reduce the yearly aggregate amount of gas bills in the State of New York \$178,000; will give a more consistent block rate; and will give effect to the advantages of the upward sliding scale as a conserver of gas.

KELLOGG, Commissioner:

I entirely concur with the reasoning employed and the conclusion reached by Commissioner Barhite in reference to the general principles of law applicable to this case. There are certain other matters, however, which it seems should be considered in arriving at the result in this case.

The great prosperity of this company, whereby it has been able to secure from its customers from the sale of its produce and distribute to its stockholders dividends many times the amount of its investment, does not of course preclude it from being entitled at this time to a full and adequate return on the present value of its property, so far as the same represents any investment made by it and the increment thereof however large.

The value of twelve million dollars (\$12,000,000) which is claimed in the brief of its counsel for its developed gas properties in Pennsylvania is sustained by the evidence, and the proportion of that investment which is used to further the New York business is a proper item of fixed capital upon which it is entitled to an adequate return in this proceeding, so far as it stands for an investment by the company of funds contributed by it. The very small amount invested by the company in the property originally, or even the amount at which it has carried upon its books, can not, I think, be used in lieu of the actual value of the property as reasonably established by many disinterested witnesses.

There is, however, in this connection a very important element to be considered. This company for years very properly set aside from its revenues, as an operating expense, a substantial sum annually to make good the depletion of its capital by reason of the consumption of the natural gas and the constant diminution of the amount of that commodity which it owned, by sale and consumption.

The method of procedure in this regard, and which would seem to be a proper one, is somewhat in detail outlined by the letter of its treasurer to this Commission, under date of July 10, 1916, which is as follows:

"Owing to the nature of the natural gas business, it was necessary many years ago to establish a method of determining amortization of capital different from that which obtains with any other kind of business. After a careful study of the subject by persons experienced in the business, it was found that the best manner in which to measure the wasting of capital assets of a natural gas company was from the average rock pressures, determined at a favorable time in each year. This ascertainment of average rock pressure is made as of September 30th, and if upon careful inspection it is found there has been a decline in the average rock pressures, which indicates a reduction of the natural gas remaining in the rock, the depreciation or amortization is fixed accordingly. If, however, because of new development it is found there has been no decline in the average rock pressures in the entire territory under development, then no entry is made for amortization because the gains in the new territory have equaled or exceeded the losses in the old territory. Such was the case in 1915 and consequently nothing was written off for depreciation or amortization.

"Because of the absolute necessity of maintaining the maximum quantity of supply in order to meet unexpected peak loads for fuel in times of severe weather; because of the dangers attending the transmission of large quantities of gas at high pressures over great distances, over mountains, valleys and through streams and because of the necessity of being ready at all times to serve consumers as they may require in widely varying quantities during the course of a single day, it is necessary to maintain the physical plant perfectly efficient. Consequently, the elements of depreciation termed wear and tear, obsolescence and inadequacy do not materially obtain.

"Therefore, the question of amortization became one of exhaustion or depletion of supply, which measures the wasting of capital assets

and determines the value of the plant to the point of possible salvage value, at which point amortization ceases."

Although this very proper method was followed by the company over a period of years, at times as financial exigencies arose this fund which had accrued was diverted, and upon occasions when the capital stock of the company was largely increased, as detailed in the opinion of Commissioner Barhite, certain portions of this fund, instead of being carried as a liability or account to make good depletion of capital, was boldly added to the capital or surplus account.

In 1911 there was transferred from this reserve for depletion the sum of \$1,921,147; again, in 1916 a similar transference in the round sum of \$1,400,000 occurred. In the year 1919, however, when the company had before it the question of Federal taxation, and under the claim that it desired to correct its reports for such purposes, it changed all of its annual reports from the year 1913 down to the year 1918, by transferring from this reserve which had accrued to surplus account the entire amount which stood on the books on December 31, 1913, of \$6,129,536. These changes of the annual reports, resulting at this time in the transfer of the entire depletion fund on hand at the close of 1913, included the transfer of the \$1,400,000 in 1916, above referred to, and was not in addition to it.

It is not necessary here to discuss the apparent effect upon the rate of income tax or excess profit tax of this very substantial addition to the fixed capital of the company, and consequent increase of the apparent profits which it earned in the pre-war period. The propriety of that operation, so far as liability for bearing a just share of the burden of the war is concerned, is for consideration in other departments and tribunals.

Certainly, by bookkeeping finesse of this nature the costs of this necessity of life can not properly be increased to those dependent upon its use.

Suffice it to say here, that by this series of changed entries

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the fund which had been set aside to make good the depreciation of the property, under the plan so carefully outlined in the letter of the treasurer of the company to this Commission, and which had been collected from the customers of the company and taken out of operating expenses year by year as a proper and necessary expenditure, was diverted from its proper channel, and no longer in its reports appears as a liability of the company. It, however, as matter of fact and of right, exists.

It is perfectly obvious that it is necessary to set aside a fund of this nature to make good depletion constantly occurring from the sales of gas. Furthermore, in this very case the company claims, as a necessary annual operating expense, a very substantial sum, amounting to several hundred thousand dollars, to make good this necessary lessening of the stock on hand by the sales of the commodity in which it deals.

Since 1913 the company had added to the fund in question, so that at the close of the year 1919 it aggregated \$1,813,206. The entire amount of this fund therefore on hand, and improperly diverted to surplus by the methods outlined, consists of the following:

Transferred from reserve to surplus 1911.....	\$1,921,147
Transfer of entire reserve of December 31, 1913, with changes of reports for the various years up to and including 1918..	6,129,536
And the fund at the close of the fiscal year 1919.....	1,813,206
Total	\$9,863,889

This sum, in addition to all of the revenues and dividends, cash and stock, which have been set forth in the opinion of Commissioner Barhite, was collected from the customers of this company to make good the depletion of capital consequent upon its operations. It was a quasi trust fund for that purpose. It was invested very largely, and properly so, in the assets of the company, and to the extent of such investments this trust fund in a sense belongs to the consumers and they can not properly be required to pay a return upon their own property.

If we assume that the entire free investments of this company, aside from the plant and equipment, which amounted at the close of 1919 to \$1,156,020, represents to that extent this "depletion" fund, we still have a balance of \$8,707,869 as the amount of this fund held by this company as an investment in its fixed capital used for gas production, which must be deducted therefrom as being no part of its own investment and no part of the fixed capital upon which it is entitled to a return.

Evidence was given of the cost of the reproduction of the tangible property at Jamestown. It aggregated \$1,401,624. The reproduction cost new of the property at the present time, although a matter for consideration in reaching a conclusion as to the value of a property in a case like this, is only one item of several which should be considered.

That present reproduction costs are very high is well known and can not be disputed, and that there has been a substantial depreciation in this property during the many years in which it has been in existence must necessarily be the case. In view of the very large amount of income which the stockholders of this company have enjoyed, far in excess of a reasonable return, they are not entitled to a return upon the undepreciated value of the property.

The impropriety of allowing reproduction value under present day conditions was very forcibly expressed by ex-Justice Hughes, as Referee in the case of *Brooklyn Borough Gas Company v. Public Service Commission*, 17 State Dept. Reports 81. In that case he wrote as follows:

"While it is important to consider the cost of reproduction in determining the fair value of a plant for rate-making purposes, it can not be said that there is a constitutional right to have the rates of a public service corporation based upon the estimated cost of the reproduction of its property at a particular time regardless of circumstances. To base rates upon a plant valuation simply representing a hypothetical cost of reproduction at a time of abnormally high prices due to exceptional conditions would be manifestly unfair to the public and likewise to base rates upon an estimated cost of reproduction far lower than the actual bona fide and prudent investment because of

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abnormally low prices would be unfair to the company. This question of taking the hypothetical reproduction cost under normal conditions as a rate base should, of course, not be confused with the necessity of recognizing actual costs of operation even though abnormal. A public service corporation is entitled to be reasonably compensated for its service and the actual cost of its operations must always be taken into consideration in determining whether or not it receives a fair compensation above that cost. But it is a different thing, after cost has been defrayed and the question is as to compensation to be allowed in excess of cost, to take as the basis for a compensatory return an asserted plant value, far above the actual investment, which is reached merely by expert estimates of a cost of reproduction under abnormal conditions. This would result in allowing a public service corporation to take advantage of a public calamity by increasing its rates above what would be a liberal return not only on actual investment but upon a normal reproduction cost in the view that unless it could make an essentially exorbitant demand upon the public it would be deprived of its property without due process of law."

Applying this obviously reasonable rule, and bearing in mind the necessary depreciation in value of the property from age and use, it would seem that a valuation of one million dollars (\$1,000,000) for this property would be an ample figure fully to cover its present value for rate making purposes.

In the computation hereinafter following, an allowance has been made for overhead expenses, including organization, etc., in addition to this sum of one million dollars which represents actual labor and material costs, of an additional 20 per cent which is ample to cover this item and is probably not excessive.

The amortization or depletion allowance of 1919, amounting to \$509,469, is too high for use as an estimate of a proper sum to be allowed for that purpose. It is out of proportion to the usual annual reservation lately made for that purpose. Since this fund was wiped out by the company at the close of the year 1913, there has been accumulated in the six years that followed the sum of \$1,813,206, or an average annual accumulation of \$302,201. This would be a fairer figure to take for rate making purposes.

The total sales of gas in New York state for 1919 were 1,526,447 M cubic feet out of 5,685,816 M cubic feet, the entire sales of the company, producing a decimal of .268. Using this decimal of .268 as New York State's proportion of this annual charge, the annual amortization or depletion allowance for this State would stand at \$80,990. Summarizing the foregoing we have the following result:

Estimated cost of Jamestown property direct labor and material charges	\$1,000,000	
Allowance for overhead costs, organization, etc., 20%	200,000	
Working capital:		
Materials and supplies, Jamestown	\$15,245	
Working cash capital	95,843	
		111,088
New York State's proportion of gas producing property, 26.8% of \$12,000,000 (Brief, p. 62)		3,216,000
Total cost of property devoted to New York State operations.		\$4,527,088
Less New York's proportion of corrected amortization reserve invested in plant and equipment; book balance in amortization reserve		
December 31, 1919	\$1,813,206	
Transferred from reserve to surplus 1918	6,129,536	
Transferred from reserve to surplus 1911	1,921,147	
		\$9,863,889
Reserve invested in property other than plant and equipment	1,156,020	
		\$8,707,869
New York State's proportion (26.8%)		2,333,709
Rate base	\$2,193,379	
8% on \$2,193,379	\$175,470	
New York State operating expenses, as claimed in company's Exhibit No. 19		219,386
Taxes chargeable to New York State operations, excluding income and excess profits tax (Exhibit No. 19)		53,787
Amortization (or depletion) allowance (26.8% of average annual charge for last six years)		80,990
Total revenue necessary for an 8% return	\$529,633	
Less 26.8% of income from miscellaneous investments	12,974	
Revenue to be made from sales or gas in New York state		\$516,659

The gas sales under the present tariff rates for the year ended August 31, 1920, aggregated 1,540,221 M cubic feet. In order to produce the suggested revenue, and even assuming that no additional gas is used on account of the lower price, the company would be entitled to collect 33.6 cents per M cubic feet, a figure arrived at by a division of the proper revenue by the amount of gas sold.

It appears, however, that for this quantity of gas the company actually collected \$682,471, or 44.3 cents per M

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cubic feet, an amount nearly one-third in excess of the proper revenue under the foregoing tabulation.

In applying the sliding scale upward, or inverted block rate, it would seem that the first step-up of the price, allowing a sufficient amount for economical consumption, should be sufficient to discourage any unnecessary use. The company's theory of the increase of 10 cents from the first block would seem to be proper, assuming the quantity included in the first block is sufficiently large to cover all proper economical use. For the reasons stated in Commissioner Barhite's opinion, the first block should be 10,000 cubic feet rather than 5000 cubic feet.

It is quite apparent that in the winter time the ordinary family can not use this commodity for all its household necessities, including heating, without exceeding the lower figure. Of course in the summer time a lesser amount may serve all purposes, but the inverted block rate is justifiable only as a conservation measure, the need of which is not present in the summer season. So it would seem to be proper that the first block should be 10,000 cubic feet, and that the increase in the cost in the next block should be 10 cents per 1000 cubic feet.

Thus with a modification of the steps of the tariff filed by the company, so as to combine the first two blocks of 5000 cubic feet in one single block, we could properly follow the plan of the rest of the tariff, and provide for three rates: the first 10,000 cubic feet, the next 5000 cubic feet, and the other for all surplus consumption.

The amount of gas consumed in Jamestown and its environs for the year ended August 31, 1920, under the various steps of the block rate in force, was as follows:

At 35 cents.....	607,521	M cubic feet
At 45 cents.....	342,979	M cubic feet
At 50 cents.....	194,038	M cubic feet
At 55 cents.....	395,683	M cubic feet

The proposed revenue properly to be allowed, \$516,659, as compared to the revenue actually secured of \$682,471.

This suggests a reduction, roughly speaking, of about one-quarter. Upon the basis of the actual consumption for the year ended August 31, 1920, taking the price of 30 cents per M cubic feet charged prior to the tariff here complained of for the first quantity and increasing the price for larger quantities by the plan suggested, we would have the following computation of resulting revenue:

30 cents for all the gas consumed in what were then the first two steps of the block rate, aggregating 950,500 M cubic feet, would produce a revenue of.....	\$285,150
Increasing the next step to 40 cents per M cubic feet, 194,038 M cubic feet, would yield a revenue of.....	77,615
And the remainder of the consumption, aggregating 895,688 M cubic feet, at 45 cents per M cubic feet, would produce a revenue of	178,057
	<hr/> \$540,822

or about \$24,000 in excess of the estimated proper return. This would suggest the propriety of reinstating the rate as it existed prior to the filing of the tariff complained of, modified by an application of an inverted block rate for the purpose of conservation. This, I think, is the proper result.

It is also reasonable to add, in accordance with a custom which has here prevailed, a charge of 2 cents per M cubic feet to be deducted upon prompt payment. This leads to the order which is proposed by Commissioner Barhite, except that the rate to be charged for gas consumed in excess of 10,000 cubic feet per month in order to give an adequate return, in view of the actual experience of the twelve months antedating August 31st last, should be 40 cents net for the second block, and 45 cents per M cubic feet for all excess consumption.

Hill, Chairman, and Irvine and Van Namee, Commissioners, concur in result of Commissioner Kellogg's opinion.

No. 572:837

Petition or Complaint of KINGSTON CONSOLIDATED RAILROAD COMPANY under subdivision 1, section 49, Public Service Commissions Law, and section 181, Railroad Law, for permission to increase passenger fares; also for consent to put proposed new tariff in effect on short notice. [Case No. 7860.]

Allowance in capital account for overhead costs related to construction: In the absence of proof of actual costs, an allowance equal to 12 per cent of the actual physical costs was made in this case.

Decided December 23, 1920.

Appearances:

Martin S. Decker, 182 Washington avenue, Albany, and *Howard Chipp*, 280 Wall street, Kingston, for petitioner.

HILL, Chairman:

This petition is for an increase of the passenger fare of 6 cents now chargeable on the street surface railroad of the petitioner in the city of Kingston. By the Commission's order of April 1, 1919, case No. 6088, the fare was increased from 5 to 6 cents, which has ever since been and now is in effect. To the extent if any that the fares are governed by local franchise conditions, such franchise conditions have been waived by the Common Council of the City of Kingston, and said council has indicated that it is in favor of an increased fare not exceeding 7 cents provided that in the judgment of the Commission the present rate of fare is inadequate. This declaration is made subject to the right of the city and its citizens to make application at any time for a modification of any order granting an increased fare.

VALUATION

In the former case, the valuation of its property submitted by petitioner was rejected, and a lower valuation of \$632,455 and less estimated depreciation \$579,840 was adopted by the Commission for the purposes only of that proceeding.

Since that time the company has re-cast its capital accounts, and now claims a fixed capital account of \$738,069.

The itemized accounts now presented have been carefully compared by the Commission with the items of the valuation heretofore adopted in the earlier case. The present valuation was supported by the testimony of a competent expert who testified that all physical costs shown in the inventory were based on original costs and not on reconstruction costs, and while these values are somewhat higher than those tentatively adopted by the Commission in the earlier case, inasmuch as they are based on actual inventory and actual costs as against estimates made by the Commission's expert at that time, the Commission feels that they merit approval. There are certain items, however, of intangible property grouped under the head of General and Miscellaneous Costs, which are not based by the expert Clarke on actual costs but on assumed costs. These items are —

Law expenditures during construction.....	\$10,038.55
Interest during construction.....	\$7,451.20
Injuries and damages.....	5,713.78
Taxes.....	6,602.36
Organization.....	35,742.00
Miscellaneous construction expenditures.....	21,600.00
Total	\$117,337.89

These items equal about 17½ per cent of the physical property values. They are, however, so highly hypothetical and some of them so improbable that they can not be accepted without some serious reductions. The items of Injuries and Damages and Taxes we accept as reasonable. Law Expenditures are based on no facts whatever and are a pure estimate; the Commission's former estimate was \$6000, which will be allowed to stand.

The witness testified that in computing Interest During Construction he assumed that the money to cover the entire physical cost had been raised before the work began, and that the entire construction occupied one year; that the money cost 6 per cent, and that it was deposited and brought interest at the rate of 2 per cent on average daily balances.

This is not only purely theoretical but it seems to us alto-

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gether improbable, as only in the rarest instances is capital thus raised in advance. Ordinarily it is not actually raised until after it is needed and the bills are due. The Commission's estimate for this item was \$17,780.

The Commission allowed nothing for cost of organization. This also is a highly hypothetical figure. The companies which were later consolidated into the present organization were very small and of local ownership. It is altogether probable that the cost of organization beyond actual expenses of incorporation were nominal, and the same is true of Miscellaneous Construction Expenditures. Perhaps the fairest way to arrive at a proper allowance is by the application of a percentage of the physical costs of this entire group of items. The Commission has from time to time allowed such percentages, ranging from 9 to 20 per cent. Such costs vary in companies according to their size and character. In this case, whatever allowance is made must be a pure estimate. We think a fair allowance would be 12 per cent. This computed on \$669,239, total direct cost, gives \$80,308.68 instead of \$117,337.89 claimed by the company, leaving \$37,029.21 to be deducted from the company's claimed valuation. This gives a total accepted valuation of \$749,446. To this should be added working capital of \$25,000, and other assets \$21,572; and when from the total thus reached we deduct the reserve or accrued depreciation, \$93,544, we get a rate base of \$702,574. Table A next shows this in schedule form.

TABLE A. RATE BASE

Item	1919	1920	1921
Company's revised fixed capital (Clarke appraisal), excluding "Intangible" items.....	<i>Dollars</i> 786,475	<i>Dollars</i> 786,475	<i>Dollars</i> 786,475
Less estimates of overhead costs deemed excessive.....	37,029	37,029	37,029
Fixed capital allowed.....	749,446	749,446	749,446
Working capital.....	25,000	25,000	25,000
Other assets.....	1,572	1,572	21,572
Totals.....	776,018	776,018	796,018
Reserve for accrued depreciation.....	39,201	59,201	93,544
Rate base.....	736,817	716,817	702,474

¹Developed by adding \$8935 (being one-twelfth of \$41,477, old rate, and two-twelfths of \$32,870, the new yearly charge) to the reserve of \$84,609 as reported in quarterly for September, 1920.

INCOME NEEDS, REVENUES AND EXPENSES

The company produced an estimate of revenue and operating expenses for the year 1921 based on different rates of fare, with accompanying comparative figures for 1919 and 1920. This statement included an expense item of \$41,477 for depreciation of way and structures, equipment, and power plant. It developed upon the hearing, however, under cross-examination by the sitting Commissioner, that the accepted percentages upon which the depreciation had been computed covered not only the tangible fixed capital but also the related intangible fixed capital or overhead costs. A corrected estimate reduced this item of depreciation to \$32,870.32.

There was also shown a present power expense of \$38,609, which after December 31, 1920, will by a change in the method of supplying power be reduced to \$32,531. The difference is \$6068, and thus while the estimate presented is a proper one for the year ending December 31, 1920, it is in this respect excessive for the year 1921.

There are no other items which seem to call for criticism, and as thus corrected the operating costs for 1921 would appear as in Table B following.

The cost of power is dependent upon the cost of coal and will fluctuate with that cost. In making rates for the future it is necessary to consider the tendency of costs and revenues. The Commission would seem to be justified in taking judicial notice of a decided prospect of decreasing costs, not only of coal but of other operating expenses; and while the prospect may not be sufficiently tangible for actual application, it should be given some bearing. In estimating revenue it is necessary to consider the probable effect upon travel of an increased rate of fare. The increase from 5 to 6 cents in the fare of this company did not cause a decrease in travel. On the contrary, an increase occurred. We will therefore assume that an increase from 6 to 7 cents will not reduce the volume of traffic. The number of passengers carried for the first

No. 572:827

nine months of 1920, extended at the same proportion over the entire year, is 3,793,000.

Taking the present coal cost and other expenses and making no allowance for prospective decrease therein, and assuming no reduction in travel, an estimated income account for one year at different rates of fare with the income applied to the rate base as hereinabove adjusted results as follows, with relative showings for the years 1919 and 1920. In this computation I have assumed that a cash fare of 7 cents with four tickets for 25 cents will yield on the average $6\frac{1}{2}$ cents.

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TABLE B, ESTIMATED INCOME ACCOUNT (excluding interest and dividends)

Item	Estimated 1921, based on						
	1919	* 1920	6¢ fare	6½¢ fare	7¢ fare	8¢ fare	
	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars
Operating revenues, transportation:							
Cash fares.....	184,201	227,611	* 228,000	246,545	* 252,000	* 258,000	
Ticket fares.....	5,587	31	.....	.....	.....	.....
Chartered car earnings.....	15	696	.....	.....	.....	.....
Mail earnings.....	696	.....	.....	.....	.....	.....
Total revenues from transportation.....	190,499	228,337	228,720	247,265	252,720	258,720	
Advertising and other privileges.....	500	500	500	500	500	500	
Total operating revenues.....	190,999	228,837	229,220	247,765	253,220	259,220	
Operating expenses:							
Maintenance of way and structures.....	5,392	* 36,900	9,868	9,868	9,868	9,868	
Maintenance of equipment.....	13,851	* 17,240	11,289	11,289	11,289	11,289	
Depreciation way and structures, equipment and power.....	20,000	.....	32,870	32,870	32,870	32,870	
Traffic expense.....	151	209	151	151	151	151	
Power expense.....	29,030	* 39,745	32,531	32,531	32,531	32,531	
Operation of cars.....	59,059	65,938	65,994	65,994	65,994	65,994	
General and miscellaneous.....	20,548	19,843	18,082	18,082	18,082	18,082	
Total operating expenses.....	148,029	179,875	170,784	170,784	170,784	170,784	
Net operating revenues.....	42,970	48,963	58,436	76,981	82,436	118,436	
Taxes.....	10,527	11,708	12,000	* 12,000	* 12,000	* 12,000	
Operating income.....	32,443	37,254	46,436	64,981	70,436	106,436	
Interest revenues.....	160	688	1,500	1,500	1,500	1,500	
Miscellaneous rent revenues.....	200	200	200	200	200	200	
Amount available for return and contingencies.....	32,803	38,142	48,136	66,681	72,136	108,136	
Rate base.....	736,817	710,817	702,574	702,574	702,574	702,574	
Ratio of return.....	4.45%	5.32%	6.85%	8.1%	10.27%	15.36%	

* As shown in annual report of company for year 1919. * Based on quarterly report covering nine months ended September 30, 1920.

* Based on 3,600,000 cash fares. * Allowances for increased taxes but omitting income tax.

* Based on 3,600,000 cash fares. * Depreciation charge included with maintenance; not separately shown in quarterly reports.

In determining the rate base it has been assumed that there should be deducted from the company's total assets such a part thereof as is represented by the depreciation reserve which it has itself set aside. It may be that this reserve is inadequate. It may be that it is excessive. Judging from the Commission's experience with other electric railroads, the former is more likely to be the case. In fact, the Commission's engineers have estimated that there should have been a reserve for accrued depreciation of \$112,615 at the end of 1918. It is not felt, however, that the company should be penalized at this time for the failure to have accumulated a reserve the exact amount of which must be, in the nature of the case, highly problematical. If it should prove that the reserve which the company is now accumulating is inadequate to take care of the retirement losses or realized depreciation on property hereafter replaced or abandoned, it will be time enough then to decide whether the burden of such losses in excess of the provision for them contained in the reserve, shall be charged against the stockholders of the company in the form of decreased dividends, or included in future operating expenses to be absorbed by the car-riding public in the fares thereafter to be paid. The company is entitled to a reasonable surplus, and the only amount which is deducted for accrued depreciation is therefore the amount which the company has dedicated to that purpose.

The company at first claimed that for the future it should be allowed something more than \$71,000 a year to cover depreciation of way and structures and equipment. This was questioned at the hearing and the proper annual charge fixed at \$32,870. This amount has been set up in the theoretical income account used for computing the probable rate of return for 1921. During a part of the year 1920, however, depreciation was actually charged at the rate of \$40,000 a year, and it appears from the company's quarterly reports to the Commission that for the first nine months of 1920, three-fourths of \$40,000, or \$30,000, was carried to

the reserve. The revised estimate of depreciation was submitted in the early part of November, and it is assumed that for the last two months of 1920 the charge was at the rate of only \$32,570 per annum. The computed balance in the depreciation reserve at the end of 1920 is arrived at by taking the balance reported by the company for September 30, 1920, and adding to it one-twelfth of \$41,477, the annual depreciation rate used in the early months of the year, plus two-twelfths of \$32,870, the revised annual rate. This of course assumes that no charges for retirements have been made against the reserve during the last three months of 1920.

It must be understood that the annual charge of \$32,570 allowed by the Commission for depreciation, is allowed for that purpose and no other. The company can not with propriety decrease this charge in order to have more money available for dividends, and the Commission will expect the company to set aside in the depreciation reserve at least as much each year as it is now allowed.

It is noticeable that the ratio of return for the years 1919 and 1920 has been somewhat low, and an examination of the record in the previous case shows that if rates of return in earlier years were to be adjusted to the higher rate base, the returns for several years would be less than the company was entitled to receive. Under these circumstances, were it not for the well defined trend to lower operating costs which is now evident, a full 7 cent fare for a limited period would not be unjust. As it is, we feel that with a cash fare of 7 cents, with the option on the part of the rider to purchase four tickets for 25 cents, a full 8 per cent return will be secured from the start with a fair prospect of exceeding the estimate.

An order will be entered authorizing the company to put into effect on five days' notice and publication, a cash fare of 7 cents, conditional on the sale of four tickets for 25 cents, effective for a period of one year and until the further order of the Commission.

All concur.

NIAGARA FALLS GAS AND ELECTRIC LIGHT CO. 845
No. 573:845

Petition or Complaint of NIAGARA FALLS GAS AND ELECTRIC LIGHT COMPANY under sections 71 and 72, Public Service Commissions Law, asking this Commission to fix higher maximum prices for gas (manufactured) to be charged the public by said company in the city of Niagara Falls. [Case No. 7917.]

Decided December 28, 1920.

Appearances:

Dudley & Gray, 45 Falls street, Niagara Falls, for petitioner.

Robert J. Moore, Corporation Counsel, for the City of Niagara Falls.

HILL, Chairman:

The rates now being charged by the applicant for manufactured gas which it distributes in the city of Niagara Falls were fixed by the Commission's order of June 12, 1919, at \$1.90 per M cubic feet, with a cash payment discount of 15 cents, making the net rate \$1.75 per M.

This application, filed November 17, 1920, alleges that such rate is unreasonably low, and asks that the Commission fix reasonable rates. The local authorities of the city appeared in opposition.

The rates and service and condition of applicant have been the subject of almost constant difficulty and contention between the company and the municipality for a number of years.

An opinion was written as the basis of the order of June 12, 1919, which is reported in 8 P. S. C. N. Y. 2nd Dist., p. 233. A rehearing was had upon the applicant's petition. Further facts were proven and an additional record made, upon which applicant asked for an increased rate. A further opinion was written and an order made denying the application March 11, 1920.

Upon the present application both of the prior records were introduced and made a part of the record herein. For the facts developed, the findings made, and the views of the Commission in those proceedings, reference is had thereto and they will not be reviewed at length here. It will be sufficient to quote the final clauses of the second opinion, as follows:

As previously stated, the present rate of \$1.90 gross and \$1.75 net is high as compared with rates in cities of similar size with Niagara Falls. It was fixed as a commercial rate, or what the traffic would bear, upon the grounds stated in the former opinion. The fact that the higher rate which it succeeded, and the restoration of which is now urged, had the effect of restricting output, indicates that the higher rate was more than the traffic would bear. It was fixed, furthermore, as a temporary rate which would serve only while the utility was determining upon a permanent policy, it being recognized that a financial reorganization was necessary in order to restore the financial integrity of the company. It was fully as high in all probability as would be necessary to yield a reasonable return upon capital actually invested after the company had rebuilt its plant, extended its lines, and effectually covered the field which lies open to it. This view is confirmed by the Forestall report. The company advances the argument that it needs the new rate as a basis for a financial showing upon which it can bring about the contemplated reorganization. The implication is that with such a figure as a basis the company would be able to demonstrate that with a new plant, extended mains, and added business, it would be able to earn a reasonable return upon its investment and also upon its large deficit. For reasons above stated, the Commission can not look upon that argument with favor.

The rate which the company demands will yield slightly more than operating expenses. The present rates will yield slightly less. We do not consider the variation vital. The question of confiscation does not enter. Neither rate will produce a compensatory return on the conceded investment, nor will any rate which the traffic will bear.

The views expressed lead to a denial of the application, and an order will be entered accordingly.

The company now shows that since the making of the former order no new financial plans have been made, and that the costs of coal and oil from which its output is produced have undergone acute advances so that the cost of production has very largely increased. The conditions

NIAGARA FALLS GAS AND ELECTRIC LIGHT Co. 847

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affecting service have not been substantially improved, the testimony of Mr. McDougal, an official of the company, in that regard being summed up from the company's standpoint, as follows:

The service at the present time is up to standard for the limited quantity of the service. There have been no more extensions, no additional generating plant owing to the impossibility to finance it.

The condition still prevails and the increased costs of production have accentuated the already serious condition of the company's finances.

Exhibits 1, 2, and 3 which were placed in evidence explain themselves without comment, and are as follows:

EXHIBIT NO. 1

Income Account, Gas, January 1, 1920, to September 30, 1920.

Gross income, gas:		
Gas sales	\$64,014.39	
Tar sales	3,873.30	
Coke sales	9,739.36	
Miscellaneous gas revenues	502.18	
		<u>\$78,129.23</u>
Gas operating expenses		76,057.93
Net income		<u>\$2,071.30</u>
Taxes		2,932.91
		<u>\$861.61</u>
Loss		
Interest charges:		
First mortgage bond interest	\$5,625.00	
Other interest	20,648.61	
		<u>26,273.61</u>
Loss for 9 months		<u>\$27,135.22</u>
at rate of \$36,180.24 per year.		

EXHIBIT NO. 2

Analysis of Revenue and Expenses, January 1, 1920, to September 30, 1920.

Cubic feet of gas sold, 36,900,700.		<i>Per M cu. ft. gas sold</i>
Total gross revenue from gas sales, including sales of residuals ..	\$78,129.23	\$2.12
Operating expenses	\$76,057.93	\$2.06
Taxes	2,932.91	.08
Interest charges	26,273.61	.71
		<u>\$2.85</u>
Operating, taxes, and interest	\$105,264.45	
Total operating, taxes, and interest		\$2.85 per M cu. ft.
Less sales of residuals, \$14,114.84 .....		.38 per M cu. ft.
		<u>\$2.47 per M cu. ft.</u>
Rates required for gas .....		.05
Add additional coal cost		
Rates required net		\$2.52 per M cu. ft.

Note: Quotation for 1920 is \$4.50 per ton; estimated increase 3.538 tons & 52 cents = \$1839.76 : .05.

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EXHIBIT NC 3

Revenues and Expenses, July 1, 1919, to September 30, 1920.

Cubic feet of gas sold, 58,810,700.		<i>Per M cu.ft.</i>
Gross revenue, gas.....	\$110,175.22	\$1.87
Residuals sold.....	22,519.68	.38
Total gas income.....	\$132,694.90	\$2.25
Operating expenses.....	\$125,145.20	\$2.12
Taxes.....	5,068.55	.09
Interest charges.....	44,293.72	.75
Operating, taxes, and interest cost.....	\$2.96 per M cu.ft.	
Less income from residuals, etc.....	.38 per M cu.ft.	
Net cost.....	\$2.58	

Since the close of the hearings the Commission has been informed by an official of the applicant that its credit has failed, that it is unable to borrow money for current expenses, and that an immediate increase in revenue is required as an alternative to closing the plant abruptly and ceasing to give any service whatever.

The increased costs of production shown by the company have been the common lot of the manufactured gas utilities during the past nine months, and the Commission has been obliged to recognize it by substantial increases in rates. As will be gathered from a perusal of the previous opinions, this case is unique. We have been compelled to base the former increased rates on what the traffic would bear instead of on a reasonable return on investment, as disclosed at length in those opinions. I fail to see any future for this company until it is reorganized on a sound financial basis and has reconstructed its gas plant. It appears that if the company is to earn interest on its present indebtedness a rate of \$2.58 per M would be needed. This is an impossible rate and the company does not even suggest it, although with less its large deficit will continue to increase.

It would, however, be unfortunate to have the plant shut down in midwinter, and such an outcome would prove a very doubtful advantage to the consumers of the company's product. At the same time, it must be understood that an increase now granted, under the circumstances outlined, is but a temporary shift to give this company in effect a

further period in which to reorganize its finances and consummate plans for a new plant. It is plain that at any rate which it might be permitted to charge it can not survive in its present condition. The city of Niagara Falls is entitled to good gas service based on a fair return on the reasonable investment of the utility giving the service. This it has not received.

It appears that the coal cost by contract will be \$4.50 per ton at the mines against \$3.98 in 1920, an additional cost of 5 cents per M. Investment and working capital were considered in the previous opinions, and in view of the disposition which I think should be made of this proceeding need not be further discussed.

In view of the unsatisfactory service, the company does not favor making either a service charge or a minimum charge.

I favor an order for a short fixed period permitting a charge of \$2.45 per M cubic feet, all prepayment meters to be fixed at that sum, with a discount of 15 cents per M for prompt payment not applicable to prepayment meters.

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Abandonment of Route.

1. Petition for approval of declaration of abandonment of a line of street railway denied, where such declaration included the entire line and it appeared only a part of the line should be abandoned. *Petition of Orange County Traction Company.* 16

2. A street surface railroad company has the right, pursuant to the provisions of the Railroad Law and with the approval of the Commission, to abandon a part of its road which it deems no longer necessary for the successful operation of its road and convenience of the public, notwithstanding such abandonment is made prior to the expiration of the term of the statutory consent of the local authorities by virtue of which the railroad was constructed. *Petition of The Chautauque Traction Company.* 107

3. Declaration of abandonment of a part of a constructed route approved. *Petition of Orange County Traction Company.* 273

4. On application to abandon certain parts of its street surface railroad which had been in existence for twenty-seven years, the company claimed that with present rates of fare its operations were unprofitable. The representatives of the public said an increase of fare was preferable to abandonment of the routes. Held that abandonment should be considered only as a last resort, and that the petition should be denied subject to further consideration after the merits of an application for increased fare had been determined. *Petition of Kingston Consolidated Railroad Company.* 617

5. Where, on application for the abandonment of a line of a street railroad, it appears that the operation of the line is important for public convenience, and that perhaps sufficient revenue may be obtained to cover necessary operating expenses by increasing rates of fare and changing the boundaries of zones, these remedies will be applied and the application disapproved. *Joint Petition of The Westchester Street Railroad Company et al.* 803

6. Where the traffic on the line will not bear a rate of fare sufficient to cover operating expenses a certificate of abandonment will be approved. *Id.*

Abandonment of Station.

When, on petition to abandon a station or make the same a non-agency stop, it appears from the evidence that the station is not run at a loss, nor are any extensive economies to be effected by its discontinuance, and that no public convenience is served by such abandonment, the petition will be denied. *Petition of New York, Ontario and Western Railway Company.* 309

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2. Where, in addition to securing an adequate return upon its investment, a natural gas company has accumulated a reserve fund to make good the depletion of its fixed capital due to consumption in operation, it is not entitled to a return upon such fund in addition to a return on the capital to make good the depletion of which it was created. *Complaint of Alfred C. Davis et al. v. Pennsylvania Gas Company.* 815

3. So far as such fund is invested in the fixed capital of the company, it should be deducted from the rate base. *Id.*

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16. Running of special trips between Watertown and Dexter as part of operation of line between Watertown and Cape Vincent forbidden. *Id.*

17. Auto bus operation authorized in the towns of Lloyd and Esopus, Ulster county, from Highland Landing to city of Kingston. *Petition of John F. Smith.* 783

18. On account of direct competition with trolley line, a zone consisting of the hamlet of Highland and vicinity created within which the operation of the auto bus line is restricted. *Id.*

19. Auto bus operation authorized in the towns of Lloyd and Marlboro, Ulster county, between Highland Landing and village of Marlboro. *Petition of John F. Smith.* 787

20. On account of direct competition with trolley line, a zone consisting of the hamlet of Highland and vicinity created within which the operation of the auto bus line is restricted. *Id.*

Bridge Crossing, Repairs.

1. A railroad corporation which has constructed and maintained a bridge over its right of way should not bear the whole cost of altering and strengthening the structure when changed conditions of highway traffic make the original structure unsafe. *Petition of The New York Central Railroad Company.* 509

2. Where a highway within the boundaries of a municipality has been improved by state funds and subsequently turned over to the municipality as a part of its street system, the cost of altering and strengthening a bridge on such highway over the right of way of a railroad company should be borne as provided by section 94 of the Railroad Law. *Id.*

3. Where increased traffic and weight of vehicles have made an existing bridge over a railroad unsafe, even though such bridge had been constructed and maintained at the expense of the railroad company, the cost of alterations and strengthening is assessable under section 91 of the Railroad Law. *Petition of The New York Central Railroad Company.* 529

4. The Commission may determine the necessity of the change in the crossing even though money for the State's portion of such change is not available. *Id.*

Burden of Proof.

On complaint as to rates charged for natural gas, the burden of proof is upon complainant to establish their unreasonableness. *Complaint of Willis Z. Georgia, etc., et al. v. Producers Gas Company.* 757

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Certificate of Public Convenience and Necessity.

¶ 1. It is the policy of the Commission to protect existing public utility corporations from competition where they are giving adequate service. *Petition of Edison U. Gaizer.* 28

2. The operation of a stage route by auto buses in the city of Newburgh sanctioned. *Petition of John A. DuBois.* 32

3. Application for certificate to operate an auto bus route dismissed. *Petition of Antoni Licewicz.* 124

4. A certificate of public convenience and necessity should be granted an auto bus line to operate over a highway connecting communities already served by a steam railroad, where on account of the distance of the railroad stations from the village centers and the intervals between stations a substantial portion of the population along the route will be better served by the bus line. *Petition of Ralph D. DeMoney.* 166

5. Public convenience and necessity require the operation of an auto bus stage line between Ossining and Tarrytown notwithstanding the service of The New York Central Railroad Company between those villages. *Petition of The Post Road Automobile Company, Inc.* 216

6. A certificate of convenience and necessity for the operation of an auto bus line over a route already served by a trolley line should be granted, where it appears that the service of the latter is inadequate to meet the needs of the public. *Petition of Richard H. Clark.* 243

7. Operation of an auto bus line should be permitted over a route a part of which is already served by another line, where it appears that the operation of the proposed route will not seriously affect the established line and will serve a substantial population not accommodated by the latter. *Petition of George E. Latham.* 274

8. Where a proposed auto bus line will serve a substantial population in a city much better than an existing trolley line, but will along a part of its route compete as to territory now adequately served if permitted to carry local passengers, a certificate of convenience and necessity should be issued only upon conditions excluding the transportation of such local passengers. *Petition of Woodlawn Improvement Association Transportation Corporation.* 281

9. Automobile lines carrying freight only do not require the consent of the local authorities or the certificate of this Commission under sections 25 and 26 of the Transportation Corporations Law. *Petition of George W. Graves.* 304

10. A certificate of convenience and necessity will not be issued to a proposed through auto bus passenger line, where transportation between the termini of the proposed line may be had over the local lines of existing carriers by transfers between such local lines. *Id.*

11. In granting certificates of convenience and necessity the Commission should take into consideration the competition involved and the condition of existing bus lines and transportation companies outside the city on the same route or closely paralleling the route proposed. *Petition of Alexandria Bay-Redwood Transportation Company, Inc.* 365

12. It is not in the interest of the public to allow such competition as will result in the bankruptcy of the persons engaged in it, for the ultimate result is that the public will not receive any permanent service whatever. *Id.*

13. Certificate granted to company paralleling in part the route of an already existing company. *Id.*

14. Where an incorporated village has brought itself within the provisions of the Transportation Corporations Law relating to auto buses and has granted a license for operation to a certain applicant and refused others, the Commission, upon the hearing for a certificate of convenience and necessity by such licensee, can not admit evidence of the necessity of bus lines proposed to be operated by applicants rejected by the village board: it can only pass upon the convenience and necessity of the line proposed to be operated by the applicant before it. *Petition of Ernest C. Hubbard.* 516

15. The granting or withholding of a license to operate an auto bus line by a village board is a matter involving the exercise of judgment and discretion. The writ of mandamus can not be invoked to compel such board to exercise its judgment and discretion in favor of a particular applicant. *Id.*

16. Operation of auto bus line between Watertown, Gunns Corners, Depauville, Clayton, and Alexandria Bay authorized. *Petition of Fred I. Dailey.* 579

17. When three main traveled routes exist between two points, all practically the same distance and all occupied by different auto bus lines charging the same fare, the Commission can not attempt to confine through travel to any one particular route. *Id.*

18. Certificate granted for operation of auto bus line between Watertown, Adams, and Pulaaki. *Petition of Arthur J. House.* 656

19. The Commission can limit the time for which certificates are issued to coördinate with the termination of local consents. *Id.*

20. The Commission has power over auto bus lines as common carriers to regulate their timetables and rates of fares, and if after regulation they are not maintained as ordered the Commission may revoke its certificate allowing such operation. *Id.*

21. Certificate granted for operation of auto bus line between Watertown, Cape Vincent, and Clayton. *Petition of Howard H. Vrooman.* 743

22. Extension line from Clayton to Alexandria Bay refused. *Id.*

23. Running of special trips between Watertown and Dexter as part of operation of line between Watertown and Cape Vincent forbidden. *Id.*

24. Auto bus operation allowed in the towns of Lloyd and Esopus, Ulster county, from Highland Landing to city of Kingston. *Petition of John F. Smith.* 782

25. On account of direct competition with trolley line, a zone consisting of the hamlet of Highland and vicinity created within which the operation of the auto bus line is restricted. *Id.*

26. Certificate granted for operation of auto bus line in the towns of Lloyd and Marlboro, Ulster county, between Highland Landing and village of Marlboro. *Petition of John F. Smith.* 787

27. On account of direct competition with trolley line, a zone consisting of the hamlet of Highland and vicinity created within which the operation of the auto bus line is restricted. *Id.*

Competition.

1. Where a corporation is giving adequate service it is the policy of the Commission to protect it from competition. *Petition of Edson U. Gaiser.* 28

2. It is the policy of the Commission to protect from competition corporations giving adequate service. *Petition of Ausable Forks Electric Company, Inc.* 61

3. An electrical corporation operating in a town but never having asked for or received a franchise for such operation and now unable to procure one, is without standing to contest an application for a franchise from another corporation on the ground that the new corporation would introduce improper competition with the objecting corporation. *Petition of Hadley Light and Power Company, Inc.* 96

4. A certificate of convenience and necessity for the operation of an auto bus line over a route already served by a trolley line should be granted, where it appears that the service of the latter is inadequate to meet the needs of the public. *Complaint of Richard H. Clark.* 243

5. Operation of an auto bus line should be permitted over a route a portion of which is already served by another line, where it appears that the operation of the proposed route will not seriously affect the established line and will serve a substantial population not accommodated by the latter. *Petition of George E. Latham.* 274

6. Where a proposed auto bus line will serve a substantial population in a city much better than an existing trolley line, but will along a part of its route compete as to territory now adequately served if permitted to carry local passengers, a certificate of convenience and necessity should be issued only upon conditions excluding the transportation of such local passengers. *Petition of Woodlawn Improvement Association Transportation Corporation.* 281

7. A certificate of convenience and necessity will not be issued to a proposed through auto bus passenger line, where transportation between the termini of the proposed line may be had over the local lines of existing carriers by transfers between such local lines. *Petition of George W. Graves.* 304

8. In granting certificates of convenience and necessity the Commission should take into consideration the competition involved and the condition of existing bus lines and transportation companies outside the city on the same route or closely paralleling the route proposed. *Petition of Alexandria Bay-Redwood Transportation Company, Inc.* 365

9. It is not in the interest of the public to allow such competition as will result in the bankruptcy of the persons engaged in it, for the ultimate result is that the public will not receive any permanent service whatever. *Id.*

10. When questions of service arise between two public service corporations, primarily it is the duty of the Commission to protect the interests of the public and permit a legitimate expansion of business when such expansion will serve the public, and any controversy between the companies as to damages which may arise should be left for solution to the courts. *Matter of Chatham Electric Light, Heat and Power Company.* 473

11. The rule prohibiting the entrance of a competing electric light company into a field already sufficiently occupied considered and applied. *Petition of Ausable Forks Electric Company, Inc.* 487

12. If an electrical company has served only a part of the territory claimed by it and has not developed the remaining part and can not so do in a reasonable time or sell electric power at reasonable rates, the public interest demands that another company able and willing to supply such service at reasonable rates be allowed to enter the field. *Petition of St. Lawrence Transmission Company.* 684

13. On account of direct competition with a trolley line, a zone consisting of the hamlet of Highland and vicinity created within which the operation of an auto line was restricted. *Petitions of John F. Smith.* 782, 787

Common Carriers.

The Commission has power over auto bus lines as common carriers to regulate their timetables and rates of fares, and if after regulation they are not maintained as ordered the Commission may revoke its certificate allowing such operation. *Petition of Arthur J. House.* 656

Conservation, Natural Gas.

The first step in an inverted block rate for natural gas should be sufficiently large to cover the absolute needs of domestic consumers during months of greatest consumption. Such a rate is established for conservation and not for revenue. Various suggestions for conserving and making more uniform the pressure of natural gas considered, and remedial measures ordered. *Complaint of Willis Z. Georgia, etc., et al. v. Producers Gas Company.* 757

Deferred Maintenance.

Where because of franchise restrictions a street railroad company has for several years been unable properly to maintain its property, in calculating future operating expenses the deferred maintenance was spread over a period of three years. *Petition of New York State Railways.* 499

Depreciation.

1. Certain "overheads" are not included in the cost of definite units of tangible property, and as overhead cost of replacement is usually absorbed in general expense accounts of current operation there is practically no realized depreciation in these items, and there should not be any annual charge in operating expenses to meet the claimed annual depreciation thereon. *Complaint of Harry N. Hoffman, etc., v. Elmira Water, Light and Railroad Company.* 45

2. When a company in the past has not had a fair return, including an annual depreciation charge, and its plant is in first-class condition and operating at full efficiency, the theoretical accrued depreciation need not necessarily be deducted from the present fixed capital account, provided that when items of property are renewed or replaced the same be charged against the renewal and replacement fund in the proportion that fund bears to the total theoretical accrued depreciation at the time of replacement, and the balance be then charged against surplus otherwise applicable to dividends. *Id.*

3. In a telephone plant which includes comparatively little underground cable, a composite percentage of 5.66 for annual depreciation held not unreasonable. *Complaint of Abram Baird, etc., v. Glen Telephone Company et al.* 248

4. Charges for depreciation should be based on the probable serviceable life of the property rather than on a percentage of revenue. *Petition of New York State Railways.* 499

Discontinuance of Agent.

1. A railroad company should not be ordered to maintain an agent in the winter time at a station where revenues are inadequate to warrant such service, but the security of freight consigned to such station should be insured by other regulations. *Complaint of The Inlet Supply Company v. Raquette Lake Railway Company.* 79

2. Where the revenues of a suburban station are depleted by raising the rate of fare to a point beyond that which the traffic will bear and which diverts former patronage to a trolley line connecting the same points, such condition is not adequate reason for the discontinuance of the services of an agent at the station. *Petition of The New York Central Railroad Company.* 737

3. Previous rulings of the Commission in such cases, as to consideration to be given to increased cost of operation due to high salary paid the agent, followed. *Id.*

Discontinuance of Train Service.

Discontinuance of train service in Forest Preserve approved. *Complaint of Chamber of Commerce of Tupper Lake v. The New York Central Railroad Company.* 287

Discrimination.

1. Discrimination in telephone rates not permitted, and revision of toll rates recommended. *Complaint of Isaac S. Heller et al. v. New York Telephone Company.* 113

2. An electric light company should not make a difference in price for its product based solely upon the use to which that product is put by the customer. *Complaint of Village of Warsaw v. Warsaw Gas and Electric Company.* 381

3. It is an unjust and unreasonable discrimination to require passengers riding in two adjoining fare zones to pay more for the through ride than the sum of the two local zone fares, the latter being open to all the world. *Complaint of Residents of Pendleton and Wheatfield v. International Railway Company.* 778

Electric Meters.

1. An electric lighting company has no legal right arbitrarily to prescribe the location in a building which must be provided by the owner for the installation of the meter. *Complaint of Horatio G. Glen v. Mohawk Edison Company, Inc.* 119

2. So long as the equipment is safe and sufficient, and a place which is safe and reasonably accessible is provided for the meter installation, the owner is entitled to service if the statutory requirements as to other matters have been complied with. *Id.*

3. A regulation that wires from the service to the meter must run in conduits promotes safety, and therefore is reasonable and should be complied with. *Id.*

Employees, Railroad.

Joint employees of a railroad company and an express company operating over its line are not disqualified from performing the duties of baggagemen, in addition to handling the express on the train, where they have performed such duties for over twenty years, although they are primarily paid by the express company and their names do not appear upon the roster of the employees of the railroad, and it is not shown that they were duly qualified trainmen before entering upon the discharge of their duties as baggagemen. *Complaint of Martin Deyman, etc., v. United States Railroad Administration, Delaware and Hudson Railroad.* 68

Estoppel.

A complainant being the owner of the fee of a street which has not been accepted as a street by the municipal authorities, having asserted that the same is a public street and insisted that the gas company should so treat the same and should lay a main therein, is by such action effectively estopped from thereafter claiming as against the gas company that the land lying within the street lines is private property and not a public street. *Complaint of First Mortgage and Real Estate Company of New York City v. Westchester Lighting Company.* 768

Fares, Electric Railroads.

1. Increase in fares by United Traction Company authorized. *Petition of United Traction Company.* 34

2. Increased operating expenses, arising chiefly from higher labor costs, permit an increase of fares in cities in which the United Traction Company operates. *Id.*

3. An electric railroad corporation operates a city system and an interurban line entering the city over the tracks of the city system. On the interurban line freight service is afforded. In an inquiry as to a reasonable rate for urban passenger service, no part of the freight revenues should be credited to city operations, but the interurban line should be charged for the maintenance of way and power used by the freight cars. These charges should be apportioned on the basis of weighted cars. *Petition of Auburn and Syracuse Electric Railroad Company.* 127

4. General and miscellaneous expenses of the city system which can not be allocated should be apportioned on the ratio borne by allocable city expenses to the entire expenses of the system. *Id.*

5. Increase in fares to 7 cents authorized, in Auburn. *Id.*

6. Increase in fares authorized. *Petition of The New York and North Shore Traction Company.* 163

7. An attempt on the part of a state commission to exercise its powers of regulation in such an arbitrary and unreasonable manner as to prevent a street railway company from obtaining a fair return upon its property used in the public service, is repugnant to due process of law and void under the Fourteenth Amendment to the Constitution of the United States. *In the Matter of Equipment and Service Furnished by New York State Railways, etc.* 178

8. Increased fares in Poughkeepsie and interurban line running to Wappingers Falls authorized under certain conditions. *Petition of Poughkeepsie and Wappingers Falls Railroad Company.* 224

8. Increase in fares in Oneonta allowed. *Petition of Southern New York Power and Railway Corporation.* 229

9. The rate of fare between Watertown and Brownville of 10 cents, without return tickets at a reduced rate, sustained. A similar charge between Watertown and Glen Park modified by requiring the issue of round-trip tickets at 15 cents. *Investigation by the Commission, etc., of The Black River Traction Company.* 294

10. Increase in fares in Jamestown authorized. *Petition of Jamestown Street Railway Company.* 330

11. In fixing rates upon an interurban electric railroad it is not necessary to consider separately the value, revenue, and expenses attributable to each village or city through which the road passes. *Petition of Hudson Valley Railway Company.* 341

12. A municipal franchise restricted fare on a street railway within the municipality to 5 cents; a later franchise provided that "the rate of fare as now established on said line and said service to be maintained as long as the patronage will warrant"; held that on an application for a higher rate the Commission might authorize the same if it should determine that the patronage no longer warrants the five cents rate. *Id.*

13. Increase in fare in each zone of Hudson Valley Railway Company authorized. *Id.*

14. A provision in a franchise granted June 28, 1913, to a street railroad company, requiring it to interchange free transfers with another street surface railroad company, does not deprive the Commission of jurisdiction to do away with such transfers as part of a plan to secure to the latter company additional revenue necessary to yield a fair return on its investment. *Petition of New York and Stamford Railway Company.* 389

15. Increases of fare and changes of boundaries of zones in order to yield such additional revenue considered, and approved as modified. *Id.*

16. Where a trolley system consists of both urban and interurban mileage and is operated as one system, about sixty miles in length, it being found that the same patrons were not to any large degree making use of the different parts of the system indiscriminately and there was comparatively little continuous riding over different divisions of the system, held that the rates on the different divisions should be treated on their respective merits, and that for rate making purposes the system should not be treated as a unit. *Petition of Schenectady Railway Company.* 403

17. The corporation proposed certain increases in rates on its various divisions, including local fares in the city of Schenectady: in that city the proposed fare was limited to 7 cents by reason of the necessity of securing a release from local authorities, and the evidence shows that the increased fare in said city will produce on the city lines only a nominal return on investment; held that it would be unreasonable to increase the rate of return upon one of the interurban divisions beyond a reasonable percentage on the theory that the rates as a whole must yield a reasonable return upon the entire investment. *Id.*

18. Fare zones should be so arranged as to avoid unnecessary discrimination. *Complaint of Armour Villa Park Association v. The Westchester Electric Railroad Company et al.* 444

19. Where by agreement with municipal authorities fare zone boundaries have been fixed by a street railroad company at municipal boundaries, fare zones will be changed by the Commission notwithstanding such agreements, if necessary to prevent the collection of excessive fares from a certain class of passengers and the change will result in an increase of revenues on account of local conditions. *Id.*

20. On application by New York State Railways to increase fares in the city of Rochester, the evidence, presuming all doubtful points most strongly against the applicant, was found to require the establishment of a cash fare of 7 cents. *Petition of New York State Railways.* 499

21. Charges for depreciation should be based on the probable serviceable life of the property rather than on a percentage of revenue. *Id.*

22. Where because of franchise restrictions a street railroad company has for several years been unable properly to maintain its property, in calculating future operating expenses the deferred maintenance was spread over a period of three years. *Id.*

23. The application for authority to sell ten tickets for 65 cents at certain points in the city was denied, and the company was required to permit the sale by conductors of four tickets for 26 cents. *Id.*

24. A fare of 8 cents in the city of Geneva and in each zone authorized. *Petition of Geneva, Seneca Falls and Auburn Railroad Company, Inc.* 533

25. Flat rate on Southern New York Power and Railway Corporation outside of city of Oneonta increased from 4 cents to 5 cents per mile. Sale of mileage books discontinued. *Petition of Southern New York Power and Railway Corporation.* 702

26. It is an unjust and unreasonable discrimination to require passengers riding in two adjoining fare zones to pay more for the through ride than the sum of the two local zone fares, the latter being open to all the world. *Complaint of Residents of Pendleton and Wheatfield v. International Railway Company.* 778

27. Increase of fares in the city of Kingston authorized. *Petition of Kingston Consolidated Railroad Company.* 837

28. In the absence of proof of actual costs, an allowance equal to 12 per cent of the actual physical costs was made. *Id.*

Fares, Steam Railroads.

1. The Interstate Commerce Commission granted to steam railroads authority to establish interstate passenger fares on a basis of 3.6 cents a mile and to make certain other increases in rates for passenger transportation. On application to the Commission by the steam railroads subject to its jurisdiction for permission to establish similar fares for intrastate passenger traffic, held that section 57 of the Railroad Law prescribes a maximum fare of 3 cents a mile for all the important railroads within the State, and the Commission was without authority to permit rates in excess of such maximum except under section 49 of the Public Service Commissions Law, and the only authority under that section for such action is where the maximum rates or fares are insufficient to yield reasonable compensation for the service rendered. *Petition of The New York Central Railroad Company et al. in respect to proposed higher passenger fares.* 467

2. The petitioners not asserting nor proving that the maximum rates chargeable under the statute are insufficient to yield reasonable compensation, but relying solely upon the ground that the enforcement of the statutory maximum in connection with the higher rates authorized interstate would be unjustly discriminatory and preferential as between interstate and intrastate travel, the petition was denied. *Id.*

3. The petition being in behalf of all steam railroads, and affording no basis for a separate determination in respect of railroads not within the limitations of section 57 of the Railroad Law, was denied in its entirety, but reserving to any railroads not within the limitations of section 57 the right to make separate applications upon the merits of each case. *Id.*

Franchise.

1. In granting consent to the construction of a street railroad a municipality may not impose a condition limiting fares to be charged to and from points outside the municipality. *Petition of United Traction Company.* 34

2. Permission to exercise an unlimited franchise refused, where the field was already occupied by another public utility corporation. *Petition of Ausable Forks Electric Company, Inc.* 61

3. Conditions at Hadley discussed; also the granting of a franchise by the town board to operate an electric plant: held that the members of the town board not having an interest in the applicant corporation at the time of the granting of the franchise, the franchise is not void in law. *Petition of Hadley Light and Power Company, Inc.* 96

4. There being no evidence of pecuniary advantage to the members of the town board and no evidence of actual bad faith, the question whether the franchise is voidable should be determined in a direct attack thereon before a judicial tribunal. The Commission should not undertake to avoid the franchise. *Id.*

5. The Commission having in 1912 undertaken to authorize the construction of the plant and the plant now being in existence, and the proposed purchaser of the corporate stock entering upon the business merely as incidental to a much larger business already conducted by him, and being willing and apparently able to operate the plant in spite of an apparently very limited market, the Commission grants the relief sought. *Id.*

6. An electrical corporation operating in a town but never having asked for or received a franchise for such operation and now unable to procure one, is without standing to contest an application for a franchise from another corporation on the ground that the new corporation would introduce improper competition with the objecting corporation. *Id.*

7. The local authorities of the Town of Dunkirk, in granting a consent or franchise to a lighting corporation to erect and maintain wires and poles for conducting and distributing electricity over and under the streets and public places of the town, imposed conditions which forbade the lighting company from furnishing current to consumers whose requirements for power are less than 75 kw.; required the company to furnish current to consumers requiring 75 kw. or more providing the company will receive a reasonable return on the necessary investment; and prohibited the company from furnishing current to others for redistribution except to the Board of Water Commissioners of the City of Dunkirk; held that such conditions are unreasonable and therefore not within the power of the local authorities to impose. *Petition of Niagara and Erie Power Company.* 325

8. A provision in a franchise granted by a municipality to construct an interurban electric railroad on the streets of the municipality, purporting to restrict the rate of fare to be charged between that municipality and points outside thereof, does not preclude the Commission in a proper case from fixing a higher rate. *Petition of Hudson Valley Railway Company.* 341

9. The Commission has power, even though an electrical company has obtained a franchise and is operating in a town, to grant an application for the construction and operation of an electric plant by another company, but it must be shown that such construction and operation are necessary or convenient for the public service. *Petition of St. Lawrence Transmission Company.* 684

10. If an electrical company has served only a part of the territory claimed by it and has not developed the remaining part and can not so do in a reasonable time or sell electric power at reasonable rates, the public interest demands that another company able and willing to supply such service at reasonable rates be allowed to enter the field. *Id.*

Federal Control.

The Federal authorities have control over a change of plans which affects the bridge crossing the Hudson river at Poughkeepsie. *Complaint of J. F. Sheahan v. Central New England Railway Company et al.* 478

Federal Income Tax.

Federal income taxes should not be allowed for in rates to be fixed. Payment thereof should be made at the expense of the stockholders of a public utility corporation and not by its rate paying customers. *Complaint of Harry N. Hoffman, etc., v. Elmira Water, Light and Railroad Company.* 233

Ferry Company.

A ferry company organized under the Transportation Corporations Law can not lawfully operate a street railroad. *Joint Petition of Great South Bay Ferry Company and Julius Bindrim.* 302

Freight Service, Electric Railroads.

An electric railroad corporation operates a city system and an interurban line entering the city over the tracks of the city system. On the interurban line freight service is afforded. In an inquiry as to a reasonable rate for urban passenger service, no part of the freight revenues should be credited to city operations, but the interurban line should be charged for the maintenance of way and power used by the freight cars. These charges should be apportioned on the basis of weighted cars. *Petition of Auburn and Syracuse Electric Railroad Company.* 127

Going Value.

The theory of an allowance for going value is that such allowance shall in the main be based upon expenditures which the company may have made in building up its business during its earlier years. It is reasonable that meagerness of return during initial years of an enterprise which has been well conceived and wisely and energetically managed and brought to a degree of success should also in fairness be made up by the public, such failure of early return being a natural incident of the business. But where the evidence in support of an allowance for going value is limited to shortage of return which is continued for seventeen years, or during the entire life of the company, until in the aggregate it far exceeds the original investment, and there is no evidence of expenditures in building up the business except as they may be implied, an allowance for going value will not be made. *Complaint of George W. Whitehead, etc., v. Niagara Falls Gas and Electric Light Company.* 136

Grade Crossing Elimination.

1. Grade crossings in Clyde ordered closed and discontinued and travel thereon diverted. *Petition of United States Railroad Administration, New York Central and West Shore Railroads.* 19

2. Where in a grade crossing elimination the cost of the work is increased on account of a breach of contract either by the railroad company or the contractor, the additional cost on account thereof paid by the railroad company can not be allowed on an accounting as a proper disbursement to be contributed to by the State. *Petition of The New York, Lackawanna and Western Railway Company et al.* 151

3. In a case of a grade elimination, in computing the share to be paid by the city and the railroad company involved, each party is entitled to interest on all sums paid by it from the time of payment to the time of accounting; and in case of delay beyond that necessarily incident to the payment of public moneys, the party in whose favor a balance exists is entitled to interest on the balance due until payment is actually made. *Petition of City of Yonkers and The New York Central Railroad Company, joined.* 268

4. A party to the action should not be allowed to benefit in the way of non-payment of interest when an accounting is delayed by reason of its own lack of diligence in closing the matter. *Id.*

5. In apportioning the cost of eliminating grade crossings, the railroad company, while under Federal control, is entitled to its regularly filed rate for transporting cinders, although it might upon application have procured the consent of the Interstate Commerce Commission to a lower rate. *Petition of State Commission of Highways.* 334

6. The State must bear its share of the war tax on transportation of materials for the elimination of grade crossings. *Id.*

7. The cost of repairs to locomotives and work equipment is a proper charge against the work of eliminating grade crossings, part of which is to be apportioned to the State. *Id.*

8. Under the Railroad Law the Commission, in apportioning the cost of the work of eliminating grade crossings, can only fix the interest on each item from the date of expenditure until the date of accounting, and has no power to determine whether or not interest should be deducted by reason of delay in the work. *Id.*

9. Application for discontinuance of grade crossing near Marcy station, New York Central railroad, denied. *Petition of The New York Central Railroad Company.* 378

10. On the petition of the State Commission of Highways alleging that public safety required a change in location of a grade crossing, the Highway Commission agreeing to bear the expense of the change in location in order that a county highway might be improved, the cost of the work and expenses incidental thereto should be borne by the State Commission of Highways and not by the railroad company. *Petition of State Commissioner of Highways.* 438

11. The town board of a town within which an alleged dangerous undergrade crossing exists may petition for the elimination or changing of such crossing, even though such crossing is situated upon a state highway and the State Commission of Highways refuses to bring such petition or to join with the town board in the same. *Petition of Town of Cuba et al. for change of highway under-crossing.* 645

12. The Commission, by virtue of its position as the controlling and determining factor in all matters relating to a change of grade or alteration of existing crossings, has full power to order such alteration and to determine and apportion the cost of such alteration. *Id.*

Income.

When a public service corporation ignores its schedule rate and charges a customer according to the terms of a private contract, the amount which would have been produced by the schedule rate should be charged against the company in determining its true income. *Complaint of Village of Warsaw v. Warsaw Gas and Electric Company.* 381

Insurance on Lives of Officers.

Premiums paid for insurance on lives of officers for the benefit of the corporation are not properly chargeable to operating expenses as against the public, but should be charged to surplus instead. *Complaint of Isaac R. Breen, etc., v. Northern New York Utilities, Inc.* 664

Interest, Grade Crossing Elimination.

1. In a case of a grade elimination, in computing the share to be paid by the city and the railroad company involved, each party is entitled to interest on all sums paid by it from the time of payment to the time of accounting; and in case of delay beyond that necessarily incident to the payment of public moneys, the party in whose favor a balance exists is entitled to interest on the balance due until payment is actually made. *Petition of City of Yonkers and The New York Central Railroad Company, joined.* 268

2. A party to the action should not be allowed to benefit in the way of non-payment of interest when an accounting is delayed by reason of its own lack of diligence in closing the matter. *Id.*

3. Under the Railroad Law the Commission, in apportioning the cost of the work of eliminating grade crossings, can only fix the interest on each item from the date of expenditure until the date of accounting, and has no power to determine whether or not interest should be deducted by reason of delay in the work. *Petition of State Commission of Highways.* 334

Interstate Commerce Commission.

The authority of the Interstate Commerce Commission does not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, and the State has jurisdiction over such tracks. *Complaint of Hatasia Chamber of Commerce, Inc., et al. v. Lehigh Valley Railroad Company et al.* 558

Inverted Block Rate.

1. The Commission favors the introduction of the sliding scale upward rate, which is built up of steps in such manner that the unit price increases as the consumption increases during any particular month. The Commission recommends that in the use of such a scale the initial step be made 10,000 cubic feet per month, and the final step be made considerably greater than in the scales now in general use. *Matter of Investigation of the Methods employed in supplying natural gas, etc.* 539

2. The first step in an inverted block, or sliding scale upward, rate for natural gas should be enough to cover the absolute needs of domestic consumers during months of greatest consumption, in this case 10,000 cubic feet per month. *Complaint of Alfred C. Davis et al. v. Pennsylvania Gas Company.* 815

Legal Expenses.

Legal expenses incurred in a rate case should not be considered as an ordinary annual expenditure in determining the amount of such expenditures in a rate fixing case. Such expenditures should be spread over a period of years in arriving at a result. The average expenditure per annum for a reasonable period in the past for legal expenses should be controlling. *Complaint of Harry N. Hoffman, etc., v. Elmira Water, Light and Railroad Company.* 233

Liability, Repairs Bridge Crossing.

1. A railroad corporation which has constructed and maintained a bridge over its right of way should not bear the whole cost of altering and strengthening the structure when changed conditions of highway traffic make the original structure unsafe. *Petition of The New York Central Railroad Company.* 509

2. Where a highway within the boundaries of a municipality has been improved by state funds and subsequently turned over to the municipality as a part of its street system, the cost of altering and strengthening a bridge on such highway over the right of way of a railroad company should be borne as provided by section 94 of the Railroad Law. *Id.*

3. Where increased traffic and weight of vehicles have made an existing bridge over a railroad unsafe, even though such bridge had been constructed and maintained at the expense of the railroad company, the cost of alterations and strengthening is assessable under section 91 of the Railroad Law. *Petition of The New York Central Railroad Company.* 529

Mail Cranes, Railroads.

1. In attempting to eliminate as far as possible the danger arising from the present method in use on railroads in this State of taking mail bags from mail cranes, an investigation was made and several changes proposed: they are here described and considered and found not practical. *Complaint of Thomas E. Ryan, etc., mail cranes.* 731

2. An order entered directing the clearance between the center line of the pouch and the center line of the adjacent track to be not less than 6 feet and 6 inches. *Id.*

Mandamus.

The granting or withholding of a license to operate an auto bus line by a village board is a matter involving the exercise of judgment and discretion. The writ of mandamus can not be invoked to compel such board to exercise its judgment and discretion in favor of a particular applicant. *Petition of Ernest C. Hubbard.* 516

Minimum Monthly Charge.

1. A proposed rate for electricity of 20 cents per kilowatt hour, with a minimum monthly charge of \$1.50, in a small municipality with a very restricted demand, held not unreasonable. *Complaint of West Winfield v. Charles G. Senif.* 74.

2. Increase in rates for gas in Utica district, with minimum monthly charge, approved. *In the Matter of Rates, Utica Gas and Electric Company.* 169

3. Minimum monthly charge for gas in Babylon approved. *Complaint of Village of Babylon v. Long Island Lighting Company.* 231

4. Increase in rates for natural gas in Elmira, with minimum monthly charge, approved. *Complaint of Harry N. Hoffman, etc., v. Elmira Water, Light and Railroad Company.* 233

5. A minimum charge and a service charge should not be allowed on the same schedule; a service charge allowed. *Petition of Fulton Fuel and Light Company.* 314

6. Increase in rates for gas in Utica, with minimum monthly charge, approved. *Complaint of Residents of Utica v. Utica Gas and Electric Company.* 419

7. Under a minimum charge the consumer pays for a certain amount of electric current whether he uses it or not; under a service charge he pays a flat amount each month and a fixed rate per kw.h. for the exact amount of electric current used. *Complaint of Town of Canton v. St. Lawrence Transmission Company.* 449

8. A service charge is fairer than a minimum charge. *Petition of Sea Cliff and Glen Cove Gas Company.* 592

9. The principle of the service charge, the method of adjusting it, and its merits as compared with a minimum charge, discussed. *Petition of Rochester Gas and Electric Corporation.* 624

Mixed Gas.

Where it appears that a public utility company which sells and distributes natural gas in the State of New York experiences a shortage in its supply at peak-load periods so that its service has become dangerous and inadequate, the remedy of requiring the company to augment its supply by erecting a plant for the manufacture of coal gas or water

gas to be mixed with its own product is not considered wise under existing economic conditions in coal gas and water gas industries, and in view of the doubt whether capital could be raised for such a purpose at this time. *Matter of Investigation of the Methods employed in supplying natural gas.* 539

Non-agency Stations.

1. In sparsely settled localities and at non-agency stations the Commission should order proper regulations for the safe delivery of freight to consignees. *Complaint of The Inlet Supply Company v. Raquette Lake Railway Company.* 79

One-man Cars.

1. The operation of one-man cars permitted in the city of Oswego under certain specified conditions. *Complaint of Empire State Railroad Corporation.* 85

2. Where a traction company makes application for permission to operate cars with one man, and such cars pass over a railroad at grade where no flagman is provided, safety of operation is the controlling factor in the case, and such permission will be denied until the methods of operation and the appliances provided by the company are sufficient, in the judgment of the Commission, to assure reasonable safety. *Petition of Hornell Traction Company.* 220

Operating Expenses.

While to a large extent the policy of the corporation as to whether or not salaries shall be liberal or otherwise, and the proportion of earnings which shall be devoted to various departments of the business, must be left to the judgment of its directors, which judgment may not be supplanted by that of the Commission, the Commission found in this case that the commercial, general, and miscellaneous expenses were excessive as compared with other like utilities in the same general territory, and took such excess into account in determining the reasonable operating expenses. *Complaint of Isaac R. Breen, etc., v. Northern New York Utilities, Inc.* 664

Overhead Costs.

In the absence of proof of actual costs, an allowance equal to 12 per cent of the actual physical costs was made. *Petition of Kingston Consolidated Railroad Company.* 837

Police Powers of the State.

Under its police powers the State may legislate in favor of the health, morals, safety, and convenience of its inhabitants. Such laws have their source in the powers which the States reserved and never surrendered to Congress and are not within the meaning of the Constitution; and considered in their own nature are not regulations of interstate commerce simply because for a limited time or to a limited extent they cover the field occupied by those engaged in such commerce; and they are to be regarded as valid until superseded by some act of Congress passed in pursuance of the power granted to it by the Constitution. *Complaint of Bataria Chamber of Commerce, Inc., et al. v. Lehigh Valley Railroad Company et al.* 558

Poughkeepsie Bridge.

The Federal authorities have control over a change of plans which affects the bridge crossing the Hudson river at Poughkeepsie. The Commission can not legally compel the owner of such bridge to provide for the safe passage of pedestrians. *Complaint of J. P. Sheahan v. Central New England Railway Company et al.* 478

Powers of a Lighting Corporation.

1. The grant of power by the State to occupy streets and highways and the consent of the municipal authorities to do likewise are not limitations upon the powers of a lighting corporation organised under the Transportation Corporations Law, but are in the nature of extensions of such corporate power and of the corporation's facilities to do lighting, both public and private. *Complaint of First Mortgage and Real Estate Company of New York City v. Westchester Lighting Company.* 768

2. The requirement of the statute that such corporation shall furnish light to the owner or occupant of any building or premises within one hundred feet of any main of the company does not recognise nor imply that such main shall be in a public street or place. *Id.*

Powers of Local Authorities.

The local authorities of the Town of Dunkirk, in granting a consent or franchise to a lighting corporation to erect and maintain wires and poles for conducting and distributing electricity over and under the streets and public places of the town, imposed conditions which forbade the lighting company from furnishing current to consumers whose requirements for power are less than 75 kw.; required the company to furnish current to consumers requiring 75 kw. or more providing the company will receive a reasonable return upon the necessary investment; and prohibited the company from furnishing current to others for redistribution except to the Board of Water Commissioners of the City of Dunkirk; held that such conditions are unreasonable and therefore not within the power of the local authorities to impose. *Petition of Niagara and Erie Power Company.* 325

Powers of the Commission.

1. The Commission is without power to vary the terms of a declaration of abandonment. *Petition of Orange County Traction Company.* 16

2. The Commission has power to order proper regulations enforced for the safe delivery of freight to consignees in sparsely settled localities and at non-agency stations. *Complaint of The Inlet Supply Company v. Raquette Lake Railway Company.* 79

3. An attempt on the part of a state commission to exercise its powers of regulation in such an arbitrary and unreasonable manner as to prevent a street railway company from obtaining a fair return upon its property used in the public service, is repugnant to due process of law and void under the Fourteenth Amendment to the Constitution of the United States. *In the Matter of Equipment and Service Furnished by New York State Railways, etc.* 178

4. Under the Railroad Law the Commission, in apportioning the cost of the work of eliminating grade crossings, can only fix the interest on each item from the date of expenditure until the date of accounting, and has no power to determine whether or not interest should be deducted by reason of delay in the work. *Petition of State Commission of Highways.* 334

5. A provision in a franchise granted by a municipality to construct an interurban electric railroad on the streets of the municipality, purporting to restrict the rate of fare to be charged between that municipality and points outside thereof, does not preclude the Commission in a proper case from fixing a higher rate. *Petition of Hudson Valley Railway Company.* 341.

6. Where an electric light company has made a contract with a municipality to furnish street lighting, the Commission is without power to fix the rate; the contract between the parties is binding. *Complaint of Village of Horseheads v. Elmira Water, Light and Railroad Company.* 370

7. A provision in a franchise granted June 26, 1913, to a street railroad company, requiring it to interchange free transfers with another street surface railroad company, does not

deprive the Commission of jurisdiction to do away with such transfers as part of a plan to secure to the latter company additional revenue necessary to yield a fair return on its investment. *Petition of New York and Stamford Railway Company.* 389

8. The Commission has authority to require a street railroad company to remove its tracks from one part of a street to another when necessary to promote the security or convenience of the public. *Complaint of Town of Whitestown v. New York State Railways et al.* 432

9. When an electric transmission company has bound itself by contract with a municipality for street lighting, the Commission can not alter the terms of the contract; if such contract results in a loss to the company, individual consumers should not be asked to pay higher rates to offset the loss. *Complaint of Town of Canton v. St. Lawrence Transmission Company.* 449

10. The Commission can not legally compel the owner of the bridge crossing the Hudson river at Poughkeepsie to provide for the safe passage of pedestrians. *Complaint of J. F. Sheahan v. Central New England Railway Company et al.* 478

11. Where an incorporated village has brought itself within the provisions of the Transportation Corporations Law relating to auto buses and has granted a license for operation to a certain applicant and refused others, the Commission, upon the hearing for a certificate of convenience and necessity by such licensee, can not admit evidence of the necessity of bus lines proposed to be operated by applicants rejected by the village board; it can only pass upon the convenience and necessity of the line proposed to be operated by the applicant before it. *Petition of Ernest C. Hubbard.* 516

12. The Commission has jurisdiction over and can compel a railroad company to elevate a bridge constructed by it over a navigable stream to a height sufficient not to interfere with navigation. *Complaint of Residents of Fort Edward, etc., v. The Delaware and Hudson Company et al.* 520

13. The Commission can not lawfully disapprove rates specified in a tariff duly filed by a telephone corporation on the ground that the company had previously agreed with the municipality affected not to apply to the Commission for leave to increase rates within a period which has not yet expired. *Complaint of Samuel A. Carlson, etc., v. Jamestown Telephone Corporation.* 566

14. When three main traveled routes exist between two points, all practically the same distance and all occupied by different auto bus lines charging the same fare, the Commission can not attempt to confine through travel to any one particular route. *Petition of Fred I. Dailey.* 579

15. The Commission may fix a maximum rate to be charged for commercial lighting above the rate limited by a local franchise. *Petition of Sea Cliff and Glen Cove Gas Company.* 592

16. A petition that the Commission assume jurisdiction over and regulate the rates charged by the National District Telegraph Company for night watch and fire alarm service, burglar alarm service, automatic fire alarm and sprinkler supervisory system service, dismissed for want of jurisdiction. *Complaint of Stewart Browne v. National District Telegraph Company.* 608

17. The Commission, by virtue of its position as the controlling and determining factor in all matters relating to a change of grade or alteration of existing crossings, has full power to order such alteration and to determine and apportion the cost of such alteration. *Petition of Town of Cuba et al. for change of highway under-crossing.* 645

18. The Commission has power over auto bus lines as common carriers to regulate their timetables and rates of fares, and if after regulation they are not maintained as ordered the Commission may revoke its certificate allowing such operation. *Petition of Arthur J. House.* 656

19. The Commission can limit the time for which certificates of public convenience and necessity are issued to coördinate with the termination of local consents. *Id.*

20. The Commission has power, even though an electrical company has obtained a franchise and is operating in a town, to grant an application for the construction and operation of an electric plant by another company, but it must be shown that such construction and operation are necessary or convenient for the public service. *Petition of St. Lawrence Transmission Company.* 684

21. The price fixed in a long term contract by which an electrical corporation agrees to supply "electrical energy" to a railway corporation, both of which corporations are subject to the jurisdiction of the Commission, may be revised by the Commission if found to be unjustly discriminatory. *Petition of Buffalo General Electric Company.* 709

22. Under section 65 of the Public Service Commissions Law, the power of the Commission to order reasonable extensions of mains of lighting corporations is not limited to extensions in public streets. *Complaint of First Mortgage and Real Estate Company of New York City v. Westchester Lighting Company.* 768

Pressure, Natural Gas.

1. When a public utility company maintains a system of mains and pipes for the distribution of natural gas which was originally installed for a pressure of from four to five ounces, the distribution of gas through such system at an actual pressure ranging as low as two-tenths of an ounce, repeated on many days throughout the Winter, is unsafe, inadequate, unjust, and unreasonable. *Matter of Investigation of the Methods employed in supplying natural gas, etc.* 539

2. Gas supplied at the low pressures mentioned in an installation equipped for a four to five ounces pressure, is burned at great loss to the consumer, who thus pays for the fault of the supplying company. *Id.*

3. Where a natural gas distributing system together with the connected service pipes and house connections have been installed for a four ounce pressure, the Commission is of opinion that it is unsafe to attempt to lower the standard of pressure to two ounces except after a preliminary survey of the entire system, including service pipes and house connections and piping and such alterations therein as may be found necessary to accommodate the lower pressure. *Id.*

Prohibition, Natural Gas.

1. Where the supply of natural gas of a public utility company is insufficient to meet the demands of domestic consumers, industrial uses in excess of 40,000 cubic feet per month to any consumer are ordered discontinued during the months of December, January, February, and March. *Matter of Investigation of the Methods employed in supplying natural gas, etc.* 539

2. Gas engines of large size, boosters, fans and blowers, directed discontinued. *Id.*

3. The period of prohibition of such use in furnaces originally constructed for other fuels enlarged so as to extend from November 1st to April 15th. *Id.*

Public Service Commissions Law.

Section 2: Telephone and telegraph corporations defined. *Complaint of Stewart Browns v. National District Telegraph Company.* 608

Sections 26, 49: Service, practices, etc. *Complaint of The Inlet Supply Company v. Raquette Lake Railway Company.* 79

Section 35: Regulations, etc. *Complaint of Batavia Chamber of Commerce, Inc., et al. v. Lehigh Valley Railroad Company et al.* 558

Section 49: Regulations, practices, etc. *Complaint of Empire State Railroad Corporation.* 85

Section 49: Fares, etc. *Petition of New York and Stamford Railway Company.* 389

Section 49: Rates, fares, etc. *Petition of The New York Central Railroad Company et al. in respect to proposed higher passenger fares.* 467

Section 49: Common carriers, etc. *Petition of Arthur J. House.* 656

Section 49: Fares, etc. *Petition of Southern New York Power and Railway Corporation.* 702

Sections 50, 57: Jurisdiction, etc. *Complaint of Residents of Fort Edward, etc., v. The Delaware and Hudson Company et al.* 520

Section 51: Regulations, etc. *Complaint of Residents of Ogdensburg, etc., v. The New York Central Railroad Company.* 587

Section 51: Changes trains, etc. *Complaint of Residents of North Creek et al. v. The Delaware and Hudson Company.* 693

Section 65: Service, etc. *Complaint of First Mortgage and Real Estate Company of New York City v. Westchester Lighting Company.* 768

Section 66: Regulations, etc. *Complaint of Horatio G. Glen v. Mohawk Edison Company, Inc.* 119

Section 68: Franchise, etc. *Petition of St. Lawrence Transmission Company.* 684

Section 72: Rates, etc. *Complaint of George W. Whitehead, etc., v. Niagara Falls Gas and Electric Light Company.* 136

Section 72: Reasonable return, etc. *Petition of Sea Cliff and Glen Cove Gas Company.* 592

Section 72: Reasonable return. *Petition of Rochester Gas and Electric Corporation.* 624

Section 92: Rates, etc. *Complaint of Samuel A. Carlson, etc., v. Jamestown Telephone Corporation.* 566.

Railroad Bridge, Alteration.

The Commission has jurisdiction over and can compel a railroad company to elevate a bridge constructed by it over a navigable stream to a height sufficient not to interfere with navigation. *Complaint of Residents of Fort Edward, etc., v. The Delaware and Hudson Company et al.* 520

Railroad Crossing.

Conditions at St. Johnsville overhead railroad crossing considered, and application for an order directing changes in structure denied. *Petition of The New York Central Railroad Company.* 133

Railroad Law.

Section 21: Construction, etc. *Complaint of Residents of Fort Edward, etc., v. The Delaware and Hudson Company et al.* 520

Section 54-a: Full Crew Law. *Complaint of Martin Degnan, etc., v. United States Railroad Administration, Delaware and Hudson Railroad.* 68

Section 57: Rates of fare. *Petition of The New York Central Railroad Company et al. in respect to proposed higher passenger fares.* 467

Section 57: Fares, etc. *Petition of Southern New York Power and Railway Corporation.* 702

Section 91: Alteration of grade crossing. *Petition of the State Commissioner of Highways.* 438

Section 91: Repairs to existing structures. Section 94: Division of cost. *Petition of The New York Central Railroad Company.* 509

Section 91: Repairs to existing structures. Sections 93 and 94: Division of cost. *Petition of The New York Central Railroad Company.* 529

Section 91: Grade crossings. *Petition of Town of Cuba et al. for change of highway under-crossing.* 645

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Railroads, Operation.

Railroads can be lawfully operated only by railroad companies. *Joint Petition of Great South Bay Ferry Company and Julius Bindrim.* 302

Rates, Electricity and Gas.

1. Conditions in Owego discussed, and increase in rates for gas authorized. *Petition of Owego Gas Light Company.* 13

2. Increase in rates for electricity, Sand Lake and North Greenbush, approved. *Complaint of Sand Lake Board of Trade et al. v. Wynantskill Hydro-Electric Company.* 23

3. Certain "overheads" are not included in the cost of definite units of tangible property, and as overhead cost of replacement is usually absorbed in general expense accounts of current operation there is practically no realized depreciation in these items, and there should not be any annual charge in operating expenses to meet the claimed annual depreciation thereon. *Complaint of Harry N. Hoffman, et al., v. Elmira Water, Light and Railroad Company.* 45

4. When a company in the past has not had a fair return, including an annual depreciation charge, and its plant is in first-class condition and operating at full efficiency, the theoretical accrued depreciation need not necessarily be deducted from the present fixed capital account, provided that when items of property are renewed or replaced the same be charged against the renewal and replacement fund in the proportion that fund bears to the total theoretical accrued depreciation at the time of replacement, and the balance be then charged against surplus otherwise applicable to dividends. *Id.*

5. A proposed rate for electricity of 20 cents per kilowatt hour, with a minimum monthly charge of \$1.50, in a small municipality with a very restricted demand, held not unreasonable. *Complaint of West Winfield v. Charles G. Senif.* 74

6. Where a lighting company furnishing manufactured gas, although suffering from insufficient patronage, is not in a position to extend its business or even to supply the full demands of its connected consumers but is relying instead upon a policy of restricted output in order to deliver its product at a reasonably safe pressure, the inadequacy of service thus manifested will be taken into consideration in fixing a price for its product. *Complaint of George W. Whitehead, et al., v. Niagara Falls Gas and Electric Light Company.* 136

7. Application for increase in rates for gas in Niagara Falls not allowed. *Id.*

8. Increase in rates for gas in Utica district approved. *In the Matter of Rates, Utica Gas and Electric Company.* 169

9. Increase in rates for gas in Babylon approved. *Complaint of Village of Babylon v. Long Island Lighting Company.* 231

10. Basic rate for gas in city of Fulton and town of Granby increased to \$2.50 per thousand cubic feet, with discount of 10 cents per thousand cubic feet for prompt payment. *Petition of Fulton Fuel and Light Company.* 314

11. Where an electric light company has made a contract with a municipality to furnish street lighting, the electric light company has no power to increase the rate fixed in the contract by filing a tariff. *Complaint of Village of Horseheads v. Elmira Water, Light and Railroad Company.* 370

12. In such a case, the Commission has no jurisdiction to fix the rate; the contract between the parties is binding. *Id.*

13. An electric light company should not make a difference in price for its product based solely upon the use to which that product is put by the customer. *Complaint of Village of Warsaw v. Warsaw Gas and Electric Company.* 381

14. When a public service corporation ignores its schedule rate and charges a customer according to the terms of a private contract, the amount which would have been produced by the schedule rate should be charged against the company in determining its true income. *Id.*

15. Increased cost of production because of increase in cost of gas oil and coal examined and held to justify increase of rate. *Complaint of Residents of Utica v. Utica Gas and Electric Company.* 419

16. The Commission will not take upon itself the burden of saying from which of several competitors a company should have purchased its supplies, always providing the contract entered into is not unreasonable in its terms nor in price materially different from the prevailing market price of the supplies at the time of purchase. *Id.*

17. When an electric transmission company has bound itself by contract with a municipality for street lighting, the Commission can not alter the terms of the contract; if such contract results in a loss to the company, individual consumers should not be asked to pay higher rates to offset the loss. *Complaint of Town of Canton v. St. Lawrence Transmission Company.* 449

18. A service charge of 90 cents a month is more fair and reasonable, both to the company and the consumer, than a minimum charge of \$2.50 per month. *Id.*

19. The Commission may fix a maximum rate to be charged for commercial lighting above the rate limited by a local franchise. *Petition of Sea Cliff and Glen Cove Gas Company.* 592

20. A company giving a wholly inadequate service should not be granted an increase in rates until such service is improved. Under the circumstances of this case, 8 per cent was held sufficient for a return on capital, including allowance for surplus and contingencies. *Id.*

21. A service charge is fairer and to be preferred to a minimum charge. *Id.*

22. A rate for gas, with a fixed base and varying automatically therefrom with the prices of coal and oil, is not a proper rate as applied to general consumers. *Petition of Rochester Gas and Electric Corporation.* 624

23. A service charge, whereby such expenses as are proportioned to the number of consumers and not to the amount of consumption are met by a uniform charge to each consumer, is just and equitable. *Id.*

24. The principle of the service charge, the method of adjusting it, and its merits, as compared with a minimum charge, discussed. *Id.*

25. The operations of the Rochester Gas and Electric Corporation considered, and a service charge of 40 cents per month for each consumer authorised, with a maximum commodity rate of \$1.30 per thousand cubic feet of gas consumed. *Id.*

26. Where a fund is accrued from annual charges to operating expense to cover theoretical depreciation of plant and equipment and other amortisation of capital, the moneys in such fund not being set aside in a sinking fund but put to use in the immediate corporate purposes of the corporation, the balance in such account will be deducted from the fixed capital in arriving at a determination of the amount upon which the return should be calculated. *Complaint of Isaac R. Breen, etc., v. Northern New York Utilities, Inc.* 664

27. Where evidence of actual investment is clear and satisfactory it will be adopted as a rate base, giving to evidence of reproduction cost only the weight of confirming the correctness of the clear evidence of actual cost. *Id.*

28. Premiums paid for insurance on lives of officers for the benefit of the corporation are not properly chargeable to operating expenses as against the public, but should be charged to surplus instead. *Id.*

29. While to a large extent the policy of the corporation as to whether or not salaries shall be liberal or otherwise, and the proportion of earnings which shall be devoted to various departments of the business, must be left to the judgment of its directors, which judgment may not be supplanted by that of the Commission, the Commission found in this case that the commercial, general, and miscellaneous expenses were excessive as compared with other like utilities in the same general territory, and took such excess into account in determining the reasonable operating expenses. *Id.*

30. The price fixed in a long term contract by which an electrical corporation agrees to supply "electrical energy" to a railway corporation, both of which corporations are subject to the jurisdiction of the Commission, may be revised by the Commission if found to be unjustly discriminatory. *Petition of Buffalo General Electric Company.* 709

31. Where such a contract provides for the supply of "electrical energy" without specifying the source or method of production, the electrical corporation is at liberty to supply the energy from any source it sees fit and the purchaser may demand the supply of any available energy regardless of the source or method of generation. *Id.*

32. Rates for gas in the city of Niagara Falls increased. *Petition of Niagara Falls Gas and Electric Light Company.* 845

Rates, Electric Railroads.

1. Increase in rates for the carriage of newspapers on electric railroad cars not allowed. *Matter of Investigation of Rochester and Syracuse Railroad Company, Inc., charges for transportation of newspapers.* 682

2. A proposed increase in rates for carriage of articles on electric cars should be justified by evidence offered by the corporation. *Id.*

Rates, Milk, Cream, etc.

1. An increase of 20 per cent in rates on milk, cream, and certain similar commodities was asked by the steam railroad carriers, and the Commission excepted these rates from the operation of the short notice permission, to be dealt with in connection with passenger rates. *Application of Steam Railroad Carriers in the State of New York for permission to increase freight rates and charges on less than statutory notice.* 480

2. Application to increase rates on milk and cream carried on passenger trains, and excess baggage rates, denied. *Petition of The New York Central Railroad Company et al. in respect to proposed higher passenger fares.* 467

Rates, Natural Gas.

1. Increase in rates for natural gas in Elmira approved. *Complaint of Harry N. Hoffman, etc., v. Elmira Water, Light and Railroad Company.* 233
2. Various contentions as to allowances for prospective expenditures considered and determined in fixing rates for natural gas. *Id.*
3. A return of 8 per cent held to be reasonable under the circumstances of the case decided. *Id.*
4. Increase in rates for natural gas to domestic consumers not allowed. *Petition of Pavilion Natural Gas Company.* 747
5. The first step in an inverted block rate for natural gas should be sufficiently large to cover the absolute needs of domestic consumers during months of greatest consumption. *Complaint of Willis Z. Georgia, etc., et al. v. Producers Gas Company.* 757
6. Where, in addition to securing an adequate return upon its investment, a natural gas company has accumulated a reserve fund to make good the depletion of its fixed capital due to consumption in operation, it is not entitled to a return upon such fund in addition to a return on the capital to make good the depletion of which it was created. *Complaint of Alfred C. Davis et al. v. Pennsylvania Gas Company.* 815
7. So far as such fund is invested in the fixed capital of the company it should be deducted from the rate base. *Id.*
8. The same principle applies where such fund once assembled is diverted from the purpose for which it was created and arbitrarily added to corporate surplus. *Id.*
9. The first step in an inverted block, or sliding scale upward, rate for natural gas should be enough to cover the absolute needs of domestic consumers during months of greatest consumption, in this case 10,000 cubic feet per month. *Id.*

Rates, Steam Railroads.

1. The Interstate Commerce Commission granted to all steam railroads within the Eastern Group authority to make effective on short notice increases in freight rates amounting to 40 per cent of existing rates, except as to milk, cream, and articles heretofore taking the same rates. On application to the Commission by the steam railroads subject to its jurisdiction for permission to file, effective on short notice, similar tariffs relating to intrastate rates, under agreed stipulation the Commission granted permission, and permitted their institution subject to complaint, investigation, and suspension under the law and the stipulation. *Application of Steam Railroad Carriers in the State of New York for permission to increase freight rates and charges on less than statutory notices.* 480
2. An increase of 20 per cent in rates on milk, cream, and certain similar commodities was asked. The Commission excepted the rates on these commodities from the operation of the short notice permission, to be dealt with in connection with passenger rates. *Id.*
3. Conditions under which limestone is transported from quarries of the Solvay Process Company at Jamesville to the plant of the company at Solvay set forth, including rates for such transportation prevailing before the period of Federal control of railroads, under Federal control, and rates inaugurated by the Interstate Commerce Commission since Federal control was surrendered; held that the burden of proof was on the shipper to show that the 25 cent rate has become too high, and that the burden was upon the carrier to justify any increase above 25 cents. *Complaint of Solvay Process Company v. The Delaware, Lackawanna and Western Railroad Company.* 790
4. It must be presumed that the 15 cent rate, reached by agreement between competent parties and effective for years without protest by either, was in its inception fair considering all conditions of the traffic and that it remained fair at least until 1917. *Id.*

5. It must also be presumed that the 25 cent rate, fixed after full hearing by a body at that time having jurisdiction, was a fair and just rate at the time it was fixed. *Id.*

6. No changes in conditions having been shown since the 25 cent rate was fixed, except the wage increases of July, 1920, and an examination of the evidence showing that 1 cent a gross ton is sufficient to cover the additional expense due to those wage increases, a rate of 26 cents a gross ton was fixed as a fair rate under present conditions. *Id.*

7. The reasonableness of a rate can not be determined by a comparison of rates on the same commodity elsewhere, in the absence of evidence showing similarity of conditions. *Id.*

8. Nor can the reasonableness of a rate be determined by comparison with a single rate on the same commodity even where conditions are largely similar, especially where the carrier is the same and one of the rates may have been fixed with reference to the other. *Id.*

9. An increase of 40 per cent in the rate on a particular commodity between specified points is not justified by a finding of the Interstate Commerce Commission that a general increase of 40 per cent was required in the entire Eastern Territory to meet the provisions of the Transportation Act 1920, in order to afford a specified return to a number of carriers as a group. *Id.*

10. A higher rate is not justified merely because the shipper is so situated and his business of such a character that he could afford to pay the higher rate and still earn a profit. *Id.*

11. A rate for a particular commodity between designated points can not be fixed on the basis of the average revenue per ton-mile of all freight transported over the carrier's system. *Id.*

Rates, Telephone.

1. Telephone rates in certain localities discussed and complaint dismissed. *Complaint of Isaac S. Heller et al. v. New York Telephone Company.* 113

2. When a telephone company installs telephones within a hotel they are installed as part of its system, and the extensions to the various rooms of the hotel are made to reach the consumers of its service. Telephones are also installed in a hotel for the use of the hotel company, its employees and guests, in rendering hotel service to its guests. That part of the service which is rendered outside the walls of the hotel is in its nature public utility service, and should be classified and paid for as such, and the regulation of the rates for same is a matter for the Public Service Commission. The work done by employees of the hotel in giving "outside the walls" service is negligible when compared with the work done by the employees of the telephone company. In rendering such service substantially the entire plant used, from the instrument in a guest's room to the instrument at the other end of the call, is the property of the telephone company. *Complaint of John A. Connolly et al. v. New York Telephone Company et al.* 155

3. Where the average return for a five-year period is shown to have been about 7½ per cent, including the final year at 8.99 per cent earned on the increased rates under consideration, but it appears that a recent wage increase will reduce the net income, and that large capital expenditure for a new telephone exchange is called for in the immediate future, the increased rates were sustained. *Complaint of Abram Baird, etc., v. Glen Telephone Company et al.* 248

4. Additional trunk lines on a private branch telephone exchange should not be charged at the same rate as the initial trunk line for the following reasons: the benefit of the installation is not enjoyed exclusively by the subscriber but is shared with the other telephone users in lessening congestion on the system; the cost of installation is less; and the cost of rendering service is less. *Complaint of Griffin Lumber Company v. New York Telephone Company.* 289

5. The Commission can not lawfully disapprove rates specified in a tariff duly filed by a telephone corporation on the ground that the company had previously agreed with the municipality affected not to apply to the Commission for leave to increase rates within a period which has not yet expired. *Complaint of Samuel A. Carlson, etc., v. Jamestown Telephone Corporation.* 566

6. A petition that the Commission assume jurisdiction over and regulate the rates charged by the National District Telegraph Company for night watch and fire alarm service, burglar alarm service, automatic fire alarm and sprinkler supervisory system service, dismissed for want of jurisdiction. *Complaint of Stewart Browne v. National District Telegraph Company.* 608

7. Where pending the decision of a complaint against rates the telephone company files a tariff still further increasing rates, such increased rates are properly before the Commission for consideration in the pending proceeding. *Complaint of Village of Lyons v. Wayne Telephone Company.* 716

8. Principles governing allowance for intangible assets in fixing a rate base considered and applied. *Id.*

9. Eight per cent allowed for return on capital, including allowance for reservations for surplus and contingencies. *Id.*

Reasonable Rate.

1. The reasonableness of a rate can not be determined by a comparison of rates on the same commodity elsewhere, in the absence of evidence showing similarity of conditions. *Complaint of Solray Process Company v. The Delaware, Lackawanna and Western Railroad Company.* 790

2. Nor can the reasonableness of a rate be determined by comparison with a single rate on the same commodity even where conditions are largely similar, especially where the carrier is the same and one of the rates may have been fixed with reference to the other. *Id.*

3. An increase of 40 per cent in the rate on a particular commodity between specified points is not justified by a finding of the Interstate Commerce Commission that a general increase of 40 per cent was required in the entire Eastern Territory to meet the provisions of the Transportation Act 1920, in order to afford a specified return to a number of carriers as a group. *Id.*

4. A higher rate is not justified merely because the shipper is so situated and his business of such a character that he could afford to pay the higher rate and still earn a profit. *Id.*

5. A rate for a particular commodity between designated points can not be fixed on the basis of the average revenue per ton-mile of all freight transported over the carrier's system. *Id.*

Reasonable Return.

1. A return of 8 per cent held to be reasonable under the circumstances of the case decided. *Complaint of Harry N. Hoffman, etc., v. Elmira Water, Light and Railroad Company.* 233

2. While in fixing rates for telephone service due regard must be had to a reasonable average return upon the capital actually expended, etc., obviously regard must be had also to many other elements of service, and this is peculiarly true of telephone service which differs greatly from other public utilities in the number and relative weight of factors to be considered. *Complaint of Abram Baird, etc., v. Glen Telephone Company et al.* 248

3. Where a fund is accrued from annual charges to operating expense to cover theoretical depreciation of plant and equipment and other amortization of capital, the moneys in such fund not being set aside in a sinking fund but put to use in the immediate corporate pur-

poses of the corporation, the balance in such account will be deducted from the fixed capital in arriving at a determination of the amount upon which the return should be calculated. *Complaint of Isaac R. Breen, etc., v. Northern New York Utilities, Inc.* 664

4. Where evidence of actual investment is clear and satisfactory it will be adopted as a rate base, giving to evidence of reproduction cost only the weight of confirming the correctness of the clear evidence of actual cost. *Id.*

5. Eight per cent allowed for return on capital, including allowance for reservations for surplus and contingencies. *Complaint of Village of Lyons v. Wayne Telephone Company.* 716

Reconstruction Value.

Although the present day costs of the constituent elements which have entered into the construction of a physical plant would be largely in excess of the actual cost at the time of construction, it does not necessarily follow that such increase constitutes any present existing value which can in any possible way be realized upon; and where it does not appear that such claimed increase is reflected in the market value of the property, either as a going concern or as a disorganized plant, *quære*, whether the enhancement can be said to exist at all. *Complaint of George W. Whitehead, etc., v. Niagara Falls Gas and Electric Light Company.* 136

Service Charge.

1. A minimum charge and a service charge should not be allowed on the same schedule; a service charge of 35 cents per meter allowed. *Petition of Fulton Fuel and Light Company.* 314

2. Where a prospective customer, entitled to service from a gas company under the law, makes written demand for such service to a building not connected with the gas main, he must, if required by the company, deposit a sum sufficient to pay the cost of laying the service pipe from the street line to the meter. *Complaint of John J. A. Rogers v. Nassau and Suffolk Lighting Company.* 321

3. The company can not make any profit on the transaction, and it is not entitled to enforce a flat charge therefor. It can only properly retain or collect the reasonable cost of the installation actually incurred. *Id.*

4. A service charge is fairer and more equitable than a minimum charge: under the minimum charge, the less electric current a consumer uses the more he pays for the privilege of using the service when he requires it; under the service charge, the cost of the service available for use is borne equally by all consumers and not entirely by small consumers. *Complaint of Town of Canton v. St. Lawrence Transmission Company.* 449

5. A service charge of 90 cents a month is more fair and reasonable both to the company and the consumer, than a minimum charge of \$2.50 per month. *Id.*

6. A service charge is fairer and to be preferred to a minimum charge. *Petition of Sea Cliff and Glen Cove Gas Company.* 592

7. A service charge, whereby such expenses as are proportioned to the number of consumers and not to the amount of consumption are met by a uniform charge to each consumer, is just and equitable. *Petition of Rochester Gas and Electric Corporation.* 624

8. The principle of the service charge, the method of adjusting it, and its merits, as compared with a minimum charge, discussed. *Id.*

9. The operations of the Rochester Gas and Electric Corporation considered, and a service charge of 40 cents per month for each consumer authorized, with a maximum commodity rate of \$1.33 per thousand cubic feet of gas consumed. *Id.*

Service, Electricity and Gas.

1. An electric light company has no legal right arbitrarily to prescribe the location in a building which must be provided by the owner for the installation of the meter. *Complaint of Horatio G. Glen v. Mohawk Edison Company, Inc.* 119

2. So long as the equipment is safe and sufficient, and a place which is safe and reasonably accessible is provided for the meter installation, the owner is entitled to service if the statutory requirements as to other matters have been complied with. *Id.*

3. A regulation that wires from the service to the meter must run in conduits promotes safety, and therefore is reasonable and should be complied with. *Id.*

4. Where a lighting company furnishing manufactured gas, although suffering from insufficient patronage, is not in a position to extend its business or even to supply the full demands of its connected consumers but is relying instead upon a policy of restricted output in order to deliver its product at a reasonably safe pressure, the inadequacy of service thus manifested will be taken into consideration in fixing a price for its product. *Complaint of George W. Whitehead, etc., v. Niagara Falls Gas and Electric Light Company.* 136

5. Where a prospective customer, entitled to service from a gas company under the law, makes written demand for such service to a building not connected with the gas main, he must, if required by the company, deposit a sum sufficient to pay the cost of laying the service pipe from the street line to the meter. *Complaint of John J. A. Rogers v. Nassau and Suffolk Lighting Company.* 321

6. The company can not make any profit on the transaction, and it is not entitled to enforce a flat charge therefor. It can only properly retain or collect the reasonable cost of the installation actually incurred. *Id.*

7. Residents of rural districts within reach of electric plants, and in territory covered by franchises of the electrical corporation, should be supplied with service if it can be done in a safe and practicable manner and without prohibitive expense. *Complaint of Samuel S. Lifshitz v. Orange County Public Service Corporation.* 428

8. Unusual installation in order to afford rural service should not be made entirely at the expense of the corporation. In this case the consumers were required to contribute to the expense of installation the difference between that expense and the average cost to the corporation per customer of distribution system, including transformers, service drops, and meters. *Id.*

9. When questions of service arise between two public service corporations, primarily it is the duty of the Commission to protect the interests of the public and permit a legitimate expansion of business when such expansion will serve the public, and any controversy between the companies as to damages which may arise should be left for solution to the courts. *Matter of Chatham Electric Light, Heat and Power Company.* 473

10. Extensions of gas mains and service in Yonkers authorized. *Complaint of Pauline Schults et al. v. Westchester Lighting Company.* 476

11. The rule prohibiting the entrance of a competing electric light company into a field already sufficiently occupied, considered and applied. *Petition of Ausable Forks Electric Company, Inc.* 487

12. A company giving a wholly inadequate service should not be granted an increase in rates until such service is improved. *Petition of Sea Cliff and Glen Cove Gas Company.* 592

13. On complaint as to insufficient pressure of gas the company was ordered to make changes and improvements as required and furnish satisfactory service. *Complaint of Residents of Freeport et al. v. Nassau and Suffolk Lighting Company.* 653

14. The grant of power by the State to occupy streets and highways, and the consent of the municipal authorities to do likewise, are not limitations upon the powers of a lighting corporation organized under the Transportation Corporations Law, but are in the nature of extensions of such corporate power and of the corporation's facilities to do lighting, both public and private. *Complaint of First Mortgage and Real Estate Company of New York City v. Westchester Lighting Company.* 768

15. The requirement of the statute that such corporation shall furnish light to the owner or occupant of any building or premises within one hundred feet of any main of the company does not recognize nor imply that such main shall be in a public street or place. *Id.*

16. A complainant being the owner of the fee of a street which has not been accepted as a street by the municipal authorities, having asserted that the same is a public street and insisted that the gas company should so treat the same and should lay a main therein, is by such action effectively estopped from thereafter claiming as against the gas company that the land lying within the street lines is private property and not a public street. *Id.*

Service, Electric Railroads.

1. The propriety of permitting the operation of one-man cars on street surface railroads considered, and such operation permitted in the city of Oswego under certain specified conditions. *Complaint of Empire State Railroad Corporation.* 85

2. The constitutional protection to public service corporations extends not alone to a preservation of the title to their properties but to the right to receive just compensation for the service given to the public. *In the Matter of Equipment and Service Furnished by New York State Railways, etc.* 178

3. Service and rates for service have a very close and important relation to each other: service may not be ordered which does not take into consideration the amount which a public service corporation may demand for such service, and a just balance must at all times be maintained between the rights of the public and the rights of the corporation. *Id.*

4. Where a traction company makes application for permission to operate cars with one man, and such cars pass over a railroad at grade where no flagman is provided, safety of operation is the controlling factor in the case, and such permission will be denied until the methods of operation and the appliances provided by the company are sufficient, in the judgment of the Commission, to assure reasonable safety. *Petition of Hornell Traction Company.* 220

5. The Commission has authority to require a street railroad company to remove its tracks from one part of a street to another when necessary to promote the security or convenience of the public. *Complaint of Town of Whites town v. New York State Railways et al.* 432

6. In this case the Commission found that the removal of a track from the side to the center of a street would not add to public security, or sufficiently to public convenience to justify an order directing such removal. *Id.*

Service, Natural Gas.

1. It is the duty of a natural gas corporation to supply persons whose premises are within one hundred feet of its mains with natural gas, under like conditions and for like purposes as it supplies other consumers. *Complaint of Edward P. Stenerson v. Baldwinville Light and Heat Company.* 583

2. The Commission can not refuse to enforce this obligation even though the supply is already inadequate to meet the needs of present consumers and can not be augmented. *Id.*

3. The first step in an inverted block rate for natural gas should be sufficiently large to cover the absolute needs of domestic consumers during months of greatest consumption. Such a rate is established for conservation and not for revenue. Various suggestions for conserving and making more uniform the pressure of natural gas considered, and remedial measures ordered. *Complaint of Willis Z. Georgia, etc., et al. v. Producers Gas Company.* 757

Service, Power.

Where by contract an electrical corporation agrees to supply "electrical energy" to a railway corporation without specifying the source or method of production, the electrical corporation is at liberty to supply the energy from any source it sees fit and the purchaser may demand the supply of any available energy regardless of the source or method of generation. *Petition of Buffalo General Electric Company.* 709

Service, Railroads.

1. Joint employees of a railroad company and an express company operating over its line are not disqualified from performing the duties of baggagemen, in addition to handling the express on the train, where they have performed such duties for over twenty years, although they are primarily paid by the express company and their names do not appear upon the roster of the employees of the railroad, and it is not shown that they were duly qualified trainmen before entering upon the discharge of their duties as baggagemen. *Complaint of Martin Degnan, etc., v. United States Railroad Administration, Delaware and Hudson Railroad.* 68

2. In sparsely settled localities and at non-agency stations the Commission should order proper regulations for the safe delivery of freight to consignees. *Complaint of The Inlet Supply Company v. Raquette Lake Railway Company.* 79

3. A railroad company should not be ordered to maintain an agent in the winter time at a station where revenues are inadequate to warrant such service, but the security of freight consigned to such station should be insured by other regulations. *Id.*

4. Discontinuance of train service in Forest Preserve approved. *Complaint of Chamber of Commerce of Tupper Lake v. The New York Central Railroad Company.* 287

5. When, on petition to abandon a station or make the same a non-agency stop, it appears from the evidence that the station is not run at a loss, nor are any extensive economies to be effected by its discontinuance, and that no public convenience is served by such abandonment, the petition will be denied. *Petition of New York, Ontario and Western Railway Company.* 309

6. The authority of the Interstate Commerce Commission does not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, and the State has jurisdiction over such tracks. *Complaint of Bataria Chamber of Commerce, Inc., et al. v. Lehigh Valley Railroad Company et al.* 558

7. The present passenger train service given by the New York Central at Ogdensburg is reasonably sufficient to accommodate the public, and the necessity of an additional morning train held not established. *Complaint of Residents of Ogdensburg, etc., v. The New York Central Railroad Company.* 587

8. While cost is not the determining factor and should be largely disregarded if an additional train is reasonably necessary, figures of former operation of such train and present cost are competent evidence. *Id.*

9. The effect of extra passenger trains on single track roads on the freight service must be considered as a factor in deciding whether the present service is reasonable. *Id.*

10. Where the principal activity of a short railroad is the movement of freight along its line, and its revenues are not sufficient to warrant the operation of more than one train to perform all its duties as a carrier, its timetable may be so arranged as to expedite its handling of freight although thereby its small passenger, express, and mail service is discommmoded. *Complaint of S. C. Jamieson v. Norwood and St. Lawrence Railroad Company.* 602

11. It is the duty of a railroad company to render adequate passenger service. It is not excused from the performance of its duty by reason of the fact that at certain times of the year such service will prove unprofitable. *Complaint of Residents of North Creek et al. v. The Delaware and Hudson Company.* 693

12. Under the facts of the case, held that two trains in passenger service, daily except Sunday, should be installed. *Id.*

13. In attempting to eliminate as far as possible the danger arising from the present method in use on railroads in this State of taking mail bags from mail cranes, an investigation was made and several changes proposed: they are here described and considered and found not practical. *Complaint of Thomas E. Ryan, etc., mail cranes.* 731

14. An order entered directing the clearance between the center line of the pouch and the center line of the adjacent track to be not less than 6 feet and 6 inches. *Id.*

15. It is the duty of a railroad company to heat properly all stations provided for prospective passengers awaiting the arrival of trains. *Matter of Proposed Non-heating of Passenger Stations on New York, Ontario and Western Railway, etc.* 754

Service, Telephone.

Additional trunk lines on a private branch telephone exchange should not be charged at the same rate as the initial trunk line for the following reasons: the benefit of the installation is not enjoyed exclusively by the subscriber but is shared with the other telephone users in lessening congestion on the system; the cost of installation is less; and the cost of rendering service is less. *Complaint of Griffin Lumber Company v. New York Telephone Company.* 289

Sidetrack Connection.

The authority of the Interstate Commerce Commission does not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, and the State has jurisdiction over such tracks. *Complaint of Batavia Chamber of Commerce, Inc., et al. v. Lehigh Valley Railroad Company et al.* 558

Stations, Heating, etc.

It is the duty of a railroad company to heat properly all stations provided for prospective passengers awaiting the arrival of trains. *Matter of Proposed Non-heating of Passenger Stations on New York, Ontario and Western Railway, etc.* 754

Statutes.

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